STATE OF CALIFORNIA
Arnold Schwarzenegger, *Governor*

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ANGELA BRADSTREET, STATE LABOR COMMISSIONER

ROBERT R. ROGINSON
Chief Counsel

June 9, 2009

Susan E. Kirkgaard
Bullivant Houser Bailey, PC
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Re: Meal Periods for Fuel Carriers Subject to Federal Safety Regulations

Dear Ms. Kirkgaard:

This is in response to your letter dated April 11, 2008, requesting an opinion from this office concerning the application of California's meal period requirements to employees engaged in the transportation of hazardous explosive materials.

In your letter and in subsequent telephone discussions with this office, you describe that California's meal period requirements present a particular challenge for an employer you represent, whose employees transport fuel to service stations throughout California and in neighboring states, because the employer must also comply with federal regulations governing carriers of hazardous explosive materials. You ask whether a driver for your client who cannot leave or be far from his or her truck due to applicable federal regulations is so restricted that any meal period is not an off-duty meal period, whether such restrictions would qualify for an on-duty meal period under the wage order, and whether these drivers may enter into blanket on-duty meal period agreements to the extent that such employees qualify for an on-duty meal period.

As described more fully below, it is the opinion of the Division of Labor Standards Enforcement (DLSE or Division) that 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 as provided for under the applicable wage order. It is also the opinion of the Division that the application of these federal regulations may, in some circumstances, satisfy the requirement for an on-duty meal period under the applicable wage order that the nature of the driver's duties prevents the employee from being relieved of all duty. Lastly, it is the opinion of the Division 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 prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken.

Factual Background

In the circumstances presented in your letter, you describe the federal regulations which prevent drivers who transport hazardous materials from being relieved of all duty in order to take a 30 minute off-duty meal period. In follow up telephone discussions, you provided the following information about the company ("Company") you represent which is seeking guidance on these issues. In particular, the Company is a California based company which transports gasoline from distributors located in and around the Bay Area to various service stations throughout the state of California and other, neighboring states. You inform that approximately 95% of the transportation is performed within California and that the remainder includes the transportation of gasoline from California to Nevada, Oregon, Washington, Arizona, and Idaho. The Company employs approximately 32 drivers and maintains three yards. The primary yard is located in Santa Rosa, California, a secondary yard is located in Martinez, California, and a third yard is located in Ukiah, California. Most drivers are dispatched out of the Santa Rosa yard on a daily basis. Four trucks are dispatched out of the Martinez facility and one driver is dispatched out of the Ukiah yard. After dispatch, the trucks are loaded with fuel at refineries and other distributors located in and around the Bay Area.

You inform that the Company's drivers are typically scheduled for 12 hours shifts and return to the Santa Rosa or Martinez facility each night. It is customary for the drivers to unload their entire load at each service station and then return to the distributor to reload or to the Santa Rosa or Martinez facility if that is the completion of their shift. Depending upon the proximity of the distributor to the service stations, the driver may deliver multiple loads during one shift. You also inform that the refineries and distributors do not permit the drivers to park and leave their vehicles unattended at the terminals where the drivers load the gasoline. The service stations similarly require the drivers to unload their gasoline loads upon arrival and do not permit the drivers to leave their trucks unattended.

You further inform that, in addition to the limitations placed by the service stations and distributors, these drivers are also covered by the Federal Hazardous Materials Act, 49 U.S.C. §§ 5103 et seq., which specifies that 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)). These regulations also specify that 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)). Further, these regulations specify that they 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 is in charge of a motor vehicle containing hazardous materials. (49 C.F.R. § 397.1(a)).

You also indicate that since these drivers are transporting hazardous explosive materials in intrastate and interstate commerce via trucks, they must have specialized training and maintain certain safety standards in the operation of their vehicles. You indicate that these employees are

traveling throughout the state of California making deliveries of the hazardous materials they are transporting and, therefore, you contend that it is impossible for the Company to simply send another employee out to relieve the driver of his or her duties for 30 minutes at a time. You also indicate that if the employee is relieved of all duties and thereby leaves the vehicle unattended, the Company will necessarily violate federal safety regulations, potentially resulting in citations, penalties, etc. for the Company. You also state that if the vehicle is left unattended the potential for explosion, leak or other adverse consequences exponentially increases, which would subject the Company to loss of product and liability to the employee and/or third parties for damages resulting from the explosion or leak.

Issues

You request an opinion on three separate issues that arise from the foregoing facts. Specifically, you request an opinion that:

1. If an employee cannot leave and/or be far from the truck due to the State or Federal regulation, the Company 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 truck due to state and federal regulations 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 the employees sign a blanket agreement for on-duty meal periods and will be in compliance with the requirements for such an agreement.

Based upon the facts presented and described above, each of your requests is addressed below, in turn.

Off-Duty Meal Period Requirements

California's meal period requirements are set forth in Labor Code § 512 and the applicable wage orders. Industrial Welfare Commission Wage Order 9-2001 governs the transportation industry, and its meal period provisions are set forth in Section 11 of the wage order. Section 11 of Wage Order 9-2001 provides, in pertinent part:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.
>
> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of

> not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. 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 written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

The term "hours worked" is defined in Wage Order 9-2001 as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (IWC Order 9-2001, subd. 2(H).)

The seminal case interpreting the "hours worked" language under the IWC Orders is *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 587. In *Morillion,* the Supreme Court held that compulsory travel time spent by agricultural workers was compensable "hours worked" where workers were required to meet at designated departure points at a certain time to ride employer's buses to work and for return to the departure point after work.

You correctly note that the Division has consistently taken the position that, except in specified circumstances involving the health care industry, if an employer does not permit an employee to leave their work site during the meal period (even if relieved of all duties) the employee must be compensated for that meal period. This is in accord with controlling case law. Unless the employee is relieved of all duty during a meal period, such time constitutes hours worked under California law. (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573-574.). (*See also, Aguilar v. Association of Retarded Citizens* (1991) 234 Cal.App.3d 21, 30 [time an employer required personal attendant employees to spend at its premises, even when they were allowed to sleep, constitutes "hours worked"]). *Bono* involved employees at a manufacturing plant who were required by their employer to remain on the premises during their 30 minute meal period. The court found that such employees were entitled to compensation for such time under the definition of "hours worked" contained in the applicable wage order. (*Bono, supra*, 32 Cal.App.4th at p. 975). The court interpreted the clause "subject to the control of the employer" contained in the definition of "hours worked" as follows:

> When an employer directs, commands, or restrains an employee from leaving the work placed during his or her lunch hour and thus prevents the employee from

> using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to [the definition of hours worked], that employee must be paid.

You present the question whether the Division's position is the same if the employees' ability to be free to take an off-duty meal period is restricted by the federal regulation governing the transportation of hazardous materials, and not simply by the employer. Under the facts presented here, the answer is yes. Wage Order 9-2001, subd. 11(C) expressly states that "[u]nless the employee is *relieved of all duty during a 30 minute meal period*," the meal period will be considered an on-duty meal, and not off-duty, meal period and counted as time worked. (Emphasis added). The obligation to attend to the vehicle is not necessarily an employer-imposed requirement but is based upon a federal regulation. Such time in carrying out this federal responsibility, however, is subject to the control of and for the benefit of the employer. Specifically, the manner and means by which the driver complies with the federal regulation is controlled by the Company, and the employee is engaged in the duty of attending to the vehicle which is part of the working conditions of the employee. The employee is not free to use such time for his or her own use but is, in fact, engaged in work duties for the benefit of the Company and in concert with the Company's own obligations under the Federal Hazardous Materials Transportation Act, including these driving and parking rules. (*See* 49 C.F.R. § 397.1). As you state, if the employee is relieved of all duties and thereby leaves the vehicle unattended, the Company will necessarily violate federal safety regulations, potentially resulting in citations and penalties for the Company. Further, if the vehicle is left unattended, the potential for explosion, leak or other adverse consequences exponentially increases, which would subject the Company to loss of product and liability to the employee and/or third for damages resulting from the explosion or leak. Under these facts and circumstances, it is clear that while the employee is engaged in fulfilling such responsibilities, he or she is not sufficiently relieved of all duty to have an off-duty meal period.

The circumstances presented here are not like those involving certain employees in the health care industry in California who are considered to have been provided a duty free meal period even though they are required to remain on the employer's work site. Under Wage Order 4-2001 and 5-2001, the term "hours worked" contain a specific definition that applies to the health care industry, as defined.[1] There is no comparable language applicable to workers employed in the transportation industry under Wage Order 9-2001.

In sum, it is the opinion of the Labor Commissioner that a meal period provided to a Company driver transporting hazardous materials who is not relieved of his or her duty to remain with or remain close to his or her truck as a consequence of their obligations under the Federal Hazardous Materials Act is not an off-duty meal period as provided for under Wage Order 9-2001. Pursuant to Wage Order 9-2001, subd. 11(C), the meal period under these circumstances is considered an on-duty meal period and must be counted as time worked. Furthermore, unless the

[1] "Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, *as interpreted in accordance with the provisions of the Fair Labor Standards Act.*" (emphasis added) *See* Section 2(K) in Wage Order 4-2001 and Wage Order 5-2001.

conditions are met for an on-duty meal period as required under Wage Order 9-2001, subd. 11(C), such a driver would be entitled to one additional hour of pay at the employee's regular rate of compensation under Labor Code § 226.7 and Wage Order 9-2001, subd. 11(D).

On Duty Meal Periods

As identified above, the requirements for an on-duty meal period are set forth in Wage Order 9-2001, subd. 11(C). The language is clear that in order for an on-duty meal period to be lawfully permitted under Wage Order 9-2001, all three of the following requirements must be met: (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 paid meal period, and (3) the written agreement states that the employee may, in writing, revoke the agreement at any time.

There are no identified published California cases identifying specific circumstances under which the nature of the work element has been found to be satisfied. The Division has, in the past, issued a number of opinion letters addressing the subject.

In 1992, the then Labor Commissioner issued an opinion letter addressing the question of whether an employee who was required to wear a pager during his meal period was in fact, permitted a "duty-free" or off-duty meal period. (O.L. 1992.01.28). In that letter, the Labor Commissioner concluded that whether such a meal period was "duty-free," and therefore non-compensable, depended upon the restrictions placed upon the employee:

> If the employee is simply required to wear a pager or respond to an in-house pager during the meal period there is no presumption that the employee is under the direction or control of the employer so long as no other condition is put upon the employee's conduct during the meal period. If, on the other hand, the employer requires the employee to not only wear the pager or listen for the in-house paging system, but also to remain within a certain distance of a telephone or otherwise limits the employee's activities, such control would require that all of the meal period time be compensated.
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> So long as the employee who is simply required to wear the pager is not called upon during the meal period to respond, there is no requirement that the meal period be paid for. On the other hand, if the employee responds, as required, to a pager call during the meal period, the whole of the meal period must be compensated.

In 1994, the then chief counsel of the Division issued an opinion letter addressing on-duty meal periods for employees of a large chain auto parts store. (O.L. 1994.09.28). Although the chief counsel was unable to provide a specific response due to the lack of necessary facts, the chief counsel described, in general terms, the view of the Division in determining whether the nature of the work prevents an employee from being relieved of all duties during the 30 minute meal period:

> In the view of the Division, the onus is on the employer to show that the work involved *prevents* the employee from being relieved of duty. Examples of situations where the nature of the work would require an on-duty lunch would be situations where the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer; or the continuous operation of machinery requiring monitoring is essential to the business of the employer.

In 2002, a staff attorney of the Division issued an opinion letter addressing the availability of an on-duty meal period for a shift manager working during a late night shift in the fast food industry. (O.L. 2002.09.04) As you describe in your letter, the staff attorney in the 2002 letter identified a multi-factor objective test, stating that the Division has *always followed* an enforcement policy that the determination of whether the nature of the work element was met must be based on the multi-factor objective test. The factors listed include (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 period, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. Contrary to what is suggested in the 2002 letter, these factors are not an exhaustive list of the factors considered in all cases. Indeed, other factors may also likely be relevant in determining whether the nature of the work prevented the employee from being relieved of all duty, such as in this case where there are federal regulations restricting the ability of the employee to be relieved of all duty. In the end, the critical determination to whether an on-duty meal period may be lawfully provided by an employer is whether the employer can establish that the facts and circumstances in the matter point to the conclusion that the nature of the work prevents the employee from being relieved of all duty. The express language of the wage order contains no requirement that, in order to have an on-duty meal period, the employer must establish that the nature of the work makes it "virtually impossible" for the employer to provide the employee with an off-duty meal period, as suggested in the 2002 opinion letter. Nor is there a rational basis to impose such a narrow, imprecise, and arbitrary standard.

In the circumstances presented in this matter, the drivers transport fuel throughout the state of California and, in some limited cases, other states as well. Neither the refineries, the distributors, nor the service stations permit the drivers to leave their vehicles unattended. In addition, these drivers are subject to the federal regulations which prevent them from being relieved of all duty in order to take a 30 minute off-duty meal period. These employees are covered by the Federal Hazardous Materials Act, 49 U.S.C. §§ 5103 et seq., which specifies that 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)). These regulations also specify that 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)). As the facts demonstrate, such employees cannot be relieved of such duties without exposing the Company to liability for violation of various federal safety regulations as well as the loss of

property and liability to employees and other third parties for damages resulting from any explosion, leak or other adverse consequence of leaving a vehicle unattended. This is not unlike the monitoring of the continuous operation of machinery that is essential to the business of an employer. Also, to the extent that the employees are traveling to distant parts of the state in fulfillment of their duties, it may likely be impossible or impractical to send another employee out to relieve the driver of his or her duties for 30 minutes.

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 under California law during the period of 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 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 these 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 meal 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.

The Company drivers at issue here work 12-hour shifts. Accordingly, such drivers must be provided a second meal period under Section 11(B) of Wage Order 9-2001. The wage order also provides that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. It is also important to understand that the on-duty meal period presented by the Industrial Welfare Commission in the wage order is a permissible, but limited, alternative to the off-duty meal period referenced in Section 11 of the wage order. The on-duty meal period is not described or defined as a waiver of an off-duty meal period. Rather, it is a *type* of meal period that can be lawfully provided only in those circumstances in which the three express conditions set forth in subdivision (C) are satisfied. The wage order itself does not limit the number of on-duty meal periods that may be taken in a workday. No identified cases hold such a restriction. Nor does the history of the on-duty meal period language in Wage Order 9, or any of the wage orders, support such a restriction. The district court's reasoning in *McFarland v. Guardsmark, LLC* (N.D. Cal 2008) 538 F.Supp.2d 1209 is persuasive. In *McFarland*, the district court granted summary judgment to an employer finding that under California law an employee may have two on-duty meal periods when they work more than 10 hours in a day. The court found that there was no support in Labor Code § 512 for plaintiff's position that an on-duty meal period that complies with the conditions under the wage orders constitutes a "waiver" of an off duty meal period:

> The court reads "waiver of the meal period" to mean that the employee gives up his right to eat during that particular five-hour shift, period. The main problem with plaintiff's argument is that he appears to be confusing the concept of totally "waiving" a meal period with the concept of agreeing to take an "on duty" meal period in lieu of an "off duty" meal period. Because the word "waiver" in the first part of § 512(a) clearly means a waiver of any meal period, it cannot mean a waiver of a particular type of meal period later in the same statute

(*McFarland, supra*, 538 F.Supp.2d at p. 1216).

In light of the express language of subdivision (C), the persuasive reasoning in *McFarland*, and the absence of any statutory, regulatory, or case authority holding or suggesting otherwise, there is no legitimate basis to conclude that on-duty meal periods cannot be provided to the Company's drivers when the three circumstances are met, regardless of the number of meal periods provided, or required to be provided, during the workday. Also, if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee if the first meal period is not waived. Of course, to the extent the driver hauling hazardous materials is provided two on-duty meal periods during the course of the workday, the burden is on the Company to establish the facts justifying any on-duty meal period in each instance in which one is provided. It remains the Division's position that even though the employee is required to work during an on-duty meal period, the employee must be given the opportunity, while working if necessary, to eat his or her meal period.

On-Duty Meal Period Agreement

Lastly, you inquire whether these drivers whose working conditions prevent them from taking an off-duty meal period may enter into a blanket agreement for on-duty meal periods and remain in compliance with the requirements for such agreements. It is the opinion of the Division 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 prevents the employee from being relieved of all duty are met for each applicable on-duty meal period taken. Stated differently, it is not necessary that the Company and driver enter into a separate agreement for each meal period. Of course, the agreement must expressly state that the employee may, in writing, revoke the agreement at any time, as required under Wage Order 9-2001, subd. 11(C).

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

We hope this letter is responsive to your request. Thank you for your interest in California wage and hour law.

Very truly yours,

Robert R. Roginson
Chief Counsel

RRR:

Cc: Labor Commissioner Angela Bradstreet

2009.06.09