STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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Edmund G. Brown Jr., *Governor*

SUSAN A. DOVI
Staff Attorney

November 15, 2013

Colin P. Calvert, Esq.
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Re: Request for Opinion

Dear Mr. Calvert,

Thank you for your letter of July 11, 2013. You previously sought an answer to whether the Labor Commissioner's Opinion Letter dated June 9, 2009 applied to flammable materials. In your July 11, 2013 letter, you ask for "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." At the same time, you indicate you are not seeking a "blanket exemption" regarding on-duty meal periods for drivers.

As the Labor Commissioner's attorney indicated in answering your initial question by letter dated June 4, 2013, the Labor Commissioner can only interpret law and regulation for enforcement purposes. It is for the Legislature to create exemptions from them. The Labor Commissioner was able to clarify the narrow question you asked in your April 3, 2013 letter, and we appreciated the opportunity to explain that, from an enforcement position, the Labor Commissioner would consider "explosive" and "flammable" materials to be functionally equivalent in determining the propriety of on-duty meal periods for drivers. Whether any particular employer policy is lawful and the limited circumstances for which an on duty meal period may be found to be lawful makes it inappropriate for the Labor Commissioner to provide an across-the-board opinion regarding the legality of employer policies, generally.

The Labor Commissioner's June 9, 2009 Opinion Letter dealt with drivers employed by gasoline distributors and referred to the federal regulations you cited in your initial letter. The June 9, 2009 letter stated that while the nature of the work prevented the drivers from being relieved of duties in certain specific circumstances or locations, the regulation did not require the drivers to remain with the vehicle under certain other circumstances or at other locations. Specifically, 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 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 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.

In your initial Request for an Opinion Letter, you implicitly raised the concern that the sections quoted above pertain to *explosive* materials, and that while the June 9, 2009 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). We addressed this concern by stating the following:

> 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.

Recent published decisions have also addressed on-duty meal periods under California law. These cases rely on the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 for the proposition that when the employer has a uniform policy, and that policy, measured against wage order requirements, violates the law, the employer is liable. *Id.* at 1033.

In *Abdullah v. U.S. Security Associates,* 731 F.3d 952 (9th Cir. 2013), *Brinker* was applied to security guards' on-duty meal periods, with the *Abdullah* court concluding that the circumstances for allowing on-duty meal periods were extremely narrow. In *Abdullah*, the Ninth Circuit referenced *Faulkinbury v. Boyd & Associates* (2013) 216 Cal.App.4th 220, and relied on four opinion letters issued by the Labor Commissioner, including the June 9, 2009 letter. In *Faulkinbury* the putative class was made up of private security guards whose employer "had a

uniform policy of requiring all security guard employees to take paid, on-duty meal breaks and to sign an agreement by which the employee agreed" to such on-duty meal breaks. *Id.* at 233. The court in *Faulkinbury* concluded that the employer's liability turned on the "issue of whether Boyd's policy requiring all security guard employees to sign blanket waivers of off-duty meal breaks is lawful. *Id* at 234. *Abdullah* quoted from *Faulkinbury*, holding that "the employer's liability arises by adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was able to take the required break goes to damages." *Id.* at 235. The Court concluded that the merits inquiry will turn on whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods—namely, whether it can invoke a 'nature of the work' defense on a class-wide basis, where the need for on-duty meal periods results from its own staffing decisions. Such an inquiry is permissible under *Brinke*r and *Faulkinbury*; the latter clarified that an employer may be held liable under state law "upon a determination that its uniform on-duty meal break policy is unlawful,' with the nature of the work defense being relevant only to damages. *Faulkinbury*, 216 Cal.App.4th at 235.This holding was reached by examining each of the opinion letters, in particular the June 9, 2009 letter. (*Id.*, *See also Bradley v Networkers International, LLC* (2012) 211 Cal.App.4th 1129, applying *Brinker* to the situation where the employer treated the workers as independent contractors and had no policy allowing for meal or rest breaks.)

Quoting from the June 6, 2009 Opinion Letter, the court in *Abdullah* first noted that an 'on-duty' meal period is a "limited alternative" to the off-duty meal period and is not a waiver of an off-duty meal period but is a type of meal period that can be lawfully provided only in those circumstances in which the three express conditions set forth in the IWC Order are satisfied. The *Abdullah* court looked to two earlier opinion letters to establish that the burden is on the employer to prove that the nature of the work prevents an employee from being relieved of all duty because of the remedial nature of the off-duty meal period requirement and that any exception to that general requirement must be narrowly construed. The earlier opinion letters are 2002.09.04, and 1994.09.28.

Next, the *Abdullah* court characterized two types of instances where DLSE has found that the "nature of the work" exception applies where (a) the work has some particular external force that requires the employee to be on duty at all times and (b) the employee is the sole employee of the particular employer. (See 2003.11.03, applying the nature of the work "exception" to an "isolated" gas station" in which only a single employee is present" but only if there was not "another employee employed at the worksite" and 1994.09.28 noting that the "nature of the work" exception might apply where the employee is the only person employed in the establishment and closing the business would work an undue hardship on the employer and distinguishing 2002.09.04 concluding that the nature of the work exception does not apply to late-night shift managers at fast-food restaurants, in part because other employees are on duty and could cover for the manager.) The court noted that these are not the only circumstances, and that the 2009 Opinion Letter listed the following non-exhaustive factors to consider:

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;

5. Whether the work product or process will be destroyed or damaged by relieving the employee of all duty.

The *Abdullah* court then emphasized the narrow scope of the conclusion in the 2009 Opinion Letter that drivers may not be prevented by the nature of their work from taking a meal period, for example, when there is another employee who may be able to cover. The 2009 letter also states that the Company and the 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.

Based on the requirement to provide an off-duty meal period in all but the narrowest of circumstances and the variety of policies and circumstances under which this issue arises, it would not be appropriate to issue any type of generalized across the board response to the legality of employer on-duty meal period policies that would adequately address any particular on-duty meal period policy.

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. The 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.

Thank you for your inquiry.

Sincerely,

Susan A. Dovi
Staff Attorney