STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, Room 3166
San Francisco, CA 94102
(415) 703-4150

H. THOMAS CADELL, JR., *Chief Counsel*

January 19, 1993

Robert Fried, Esq.
Thierman, Cook, Brown & Prager
601 California Street, 17th Floor
San Francisco, CA 94108

Re: **Contractor Safety Orientation Program**

Dear Mr. Fried:

The Labor Commissioner has asked this office to respond to your letter of November 12, 1992, regarding the above-referenced subject.

According to your letter you seek guidance regarding the obligations of contractors to pay for the safety orientation training required by the recently enacted written injury and illness prevention plan requirements and the provisions of Labor Code §7850, et seq.

Your letter recites the following facts:

> Your firm represents a general contractor engaged in industrial construction in Northern California, a portion of which involves work for refineries and other heavy industry in the Contra Costa and Solano County areas. Many of these industrial users have joined together to form the Bay Area Training Trust ("BATT"), which, in turn, established a Contractor Safety Orientation Program ("CSOP"), as part of BATT. The CSOP is an 8-hour contractor safety orientation program open to all individuals (excluding janitorial, secretarial\clerical, security, contract haulers, delivery drivers, and off-site engineering) who wish to be employed at industrial jobsites or plants participating in the program. The purpose of the program is to facilitate industry wide implementation of jobsite safety goals. It will implement principles set out by the legislature in enacting the SB 198 written injury and illness prevention plan requirement, and the refinery and chemical plant process standards set out, in part, at Labor Code §7850, et seq. and the curriculum will cover safety training subjects common to industrial construction sites such as those operated by

participants. Participants will receive a certificate upon completion of the course. Such certificate must be shown to be eligible to work at one of the industrial sites participating in BATT.

Your letter also states that:

"*All contractors working for employers participating in the trust will be required to insure that their employees have complied with the above certification requirements in order for them to be allowed to work on jobsites operated by BATT members.*"

You ask two questions. First, you ask:

"May the employer require, as a condition of continued employment, that currently employed workers obtain the certification on their own time and at their own expense?"

The answer, as you conclude, is no. However, the reasons you cite for reaching this conclusion are not the reasons used by this Division in reaching the same conclusion.

The considerations to be addressed in concluding that the workers must be compensated by the employer for the time and normal expenses incurred in becoming certified have much to do with the public policy surrounding the implementation of the law, not with the nuances of the federal Fair Labor Standards Act. As the court in the case of *DLSE v. Texaco, Inc.* (1983) 152 Cal.App.3d Supp. 1, noted after discussing a similar argument put forward by Texaco in that case:

"We do not question the correctness of the *Tennessee* court's analysis. We do question the appropriateness of applying FLSA work time standards in the context of the Occupational Safety and Health Act. In *Marshall v. Ohio Power Company*, 8 O.S.C.H. 1322, the court observed, "It is obvious that employer control of employees during an OSHA walk-around would be incongruous with the purpose for their presence." The inappropriateness of the use of statutory constructions of "worktime" derived from FLSA cases in industrial safety cases such as the one at bench should be obvious." *DLSE v. Texaco, supra*, 152 Cal.App.3d at 9.

The provisions of Division 5 of the California Labor Code deal with safety in the workplace. "[S]afety benefits inure to employer as well as employee. Furthermore, under Labor Code sections 6400-6405, California employers have an affirmative duty to 'furnish employment and a place of employment which are safe for the employees therein'." (See § 6400.) *DLSE v. Texaco, supra*, 152 Cal.App.3d Supp. at 17. The provisions of Labor Code §7850, et

seq. are, *inter alia*, intended to aid employers in achieving compliance with these affirmative duties.

It must be obvious that the Legislature has placed the onus upon the employer to "furnish employment and a place of employment which are safe and healthful for the employees therein." (Labor Code §6400)

Section 6401 provides: "Every *employer* shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every *employer* shall do every other thing reasonably necessary to protect the life, safety, and health of employees."

Section 6402: "No *employer* shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful."

Section 6403, subdivisions (a) (b) and (c): "No *employer* shall fail or neglect:

> "(a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.
> "(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.
> "(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees."

Section 6404: "No *employer* shall occupy or maintain any place of employment that is not safe and healthful." Section 6405: "No employer, owner, or lessee of any real property shall construct or cause to be constructed any place of employment that is not safe and healthful."

Thus, the rationale for the imposition of the obligation to pay for the training of the employees is not based upon a narrow reading of the Fair Labor Standards Act; nor is it based upon the application of the Division of Labor Standards Enforcement's policy regarding "training". The rationale is based upon the finding by the Legislature that "a key element for assuring workplace safety is adequate employee training," coupled with the fact that the California Legislature has obligated the employer to provide a safe and healthful workplace and to take all steps necessary to carry out that mandate.

This same rationale is applicable to the applicants for employment; the second issue you raise in your letter. The obligation is upon the employer to furnish the safe working environment. To allow the employer to escape the obligations which the

Legislature has thrust upon them simply by requiring that the training they are required to provide must be acquired by the potential employee at his own cost as a condition of employment would thwart the clear legislative mandate.

In addition, we find no provision in the Labor Code which would require that the *employee* must obtain any "safety certification" or meet any specific credential requirements. Yet, in your letter, you state that your client's organization plans to require subcontractors to assure that "their employees have complied with the above certification requirements".

Labor Code §450 provides:

> "No employer, or agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer or any other person, in the purchase of any thing of value."

Since the "training" must be purchased, and the "certification" must be available as a condition of employment, the scheme would appear to violate the provisions of Labor Code §450.

I hope this adequately addresses the questions you raised in your letter of November 12, 1992. Please excuse the delay in responding to your letter.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.

c.c. Victoria Bradshaw
Mike Mason, Chief Counsel, DOSH