

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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MILES E. LOCKER, Chief Counsel

November 12, 1998

Kari K. Blackburn
Counselor at Law
4937 San Jacinto Circle East
Fallbrook, CA 92028

Re: Training Program Exemption

Dear Ms. Blackburn:

This is in response to your letter asking for an opinion concerning the establishment of a training program for non-employees desiring to work in the petrochemical industry. Your letter states that your client wishes to establish a training program for individuals who are not currently employed by your client, which is a staffing company. Your letter states that the training, which is of a general nature, would be provided by an independent training firm, and that the training applies to the petrochemical industry, not specifically to a particular employer or company. You further state that the training includes classroom, demonstration and hands-on training, but no actual work is performed, and neither the staffing company nor its clients derive any immediate benefit from the activities of the trainees during the training.

You further state that upon successful completion of the training, which is designed to fulfill governmental requirements for the petrochemical industry, and upon passage of written test(s), a certificate necessary to work in the industry will be awarded. You also state that completion of the training does not entitle the participant to a job, but that an offer of a job will be contingent passage of the test(s) and availability of openings with one of the staffing company's clients at that time. Successful participants in the program are not obligated to either apply for or accept positions with the staffing company or its clients.

You state that training course fees will be paid to the independent training firm by the staffing company, but you do not state whether the staffing company funds these fees by charging participants, potential clients, or clients who obtain qualified participants in the training program through the staffing company. You do state that the staffing company is obligated to pay for the training program whether or not the trainee passes or completes the course. Trainees sign a written statement prior to commencement of

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the training acknowledging that they are not employees of the staffing company and are not entitled to wages for the time spent in training, and no benefits payable to employees of the staffing company or its clients are received by the trainees.

It is apparent from your inquiry that you and/or your clients have given thoughtful consideration to the eleven prong test traditionally employed by DLSE in evaluating training programs, as set forth in Wilcox, *California Employment Law*, Section 1.04(f). Under this test, a person enrolled in a training program will not be considered to be an employee if all of the following criteria are met:

1. The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
4. The employer derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.
7. Any clinical training is part of an educational curriculum.
8. The trainees or students do not receive employee benefits.
9. The training is general, so as to qualify the trainees or students for work in any similar business, rather than designed specifically for a job with the employer offering the program. In other words, on completion of the program, the trainees or students must not be fully trained to work specifically for only the employer offering the program.
10. The screening process for the program is not the same as for employment, and does not appear to be for

that purpose, but involves only criteria relevant for admission to an independent educational program.

11. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although the employer may indicate that qualified graduates will be considered for employment.

The only factors in this test which I do not see specifically addressed by your letter are screening of applicants, advertisement of the course(s) and the question of whether the training is similar to that which would be given in a vocational school, or whether the clinical ("hands-on") portion of the training is part of an educational curriculum. Traditionally, DLSE has required that such training be an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession. Your letter does include descriptions of several courses available to the trainees, with reference to OSHA. This agency is not equipped to pre-qualify actual course content. If, however, your client can meet its burden, if challenged, to demonstrate that the courses actually offered are comparable to those offered by technical or vocational institutions, it would appear that this type of program would meet the requirements of prongs (1) and (7) of the test as set forth in Wilcox. The requirements as to screening of the employees for participation in the training are that the screening process be neither the same as that used to screen job applicants for the staffing company or its clients, nor so inextricably intertwined as to make the distinction, if any, meaningless. The requirements as to advertising are that the solicitations are to apply for the training, not for employment.

Naturally, the question of whether any particular individual is a bona-fide trainee as to whom no employment relationship exists will turn on the particular facts relating to his or her participation in the program, not on proposals for a program. If you have any further questions, feel free to contact my office.

Thank you for your interest in California labor law.

Very truly yours,



Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen