STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

October 21, 1993

Dwight L. Armstrong, Esq.
Allen, Matkin, Leck, Gamble & Mallory
18400 Von Karman, Fourth Floor
Irvine, CA 92716-1597

Re: **Your Letter of September 29, 1993**

Dear Mr. Armstrong:

This is intended to respond to your letter of September 29, 1993, wherein you ask that the DLSE confirm that:

1. The Student in the proposed program which you briefly describe are not "employees" under the California Wage Orders, and, accordingly, are not subject to various wage and hour laws, (e.g., minimum wage, overtime, etc.)

2. The company (your client) need not obtain work permits for students under the age of 18 who participate in the program.

According to the facts contained in your letter:

> The company provides technical, engineering, marketing, legal and administrative support to a sales and distribution organization. The company has been approached by a private junior college and a public high school to provide a few of their students with a "real life" learning experience as part of their education. The proposed program contemplates that a small number of students, generally from 17 to 18 years of age, will be selected by the company for the program from qualified applicants who are submitted for interviews by the schools.
>
> The students would spend a minimum of twelve hours per week for a period of 12 weeks. Although scheduling of hours is flexible, students generally are on site either 8 am to 12 noon or 1 pm to 5 pm for a minimum of three days a week (Monday through Friday).

Students would be expected to:

assist in answering telephones;

assist with clerical duties: filing, mail distribution, xeroxing, faxing and light typing;

assist with ordering and storing supplies; and

assist with special projects/reports using Microsoft Word and Excel.

According to your letter, in completing the above assignments, students are not replacing or displacing the Company's employees, but a receiving instruction from and assisting the Company's employees. You further point out that, in your opinion, due to the lower level of skill proficiency and experience, students benefit from the on-site instruction the program provides and the company does not derive any immediate advantage from the activities of the students. Among the benefits of the program which are anticipated is the fact that it "develops potential candidates for future workforce and contributes to the company's goal for diversity by expanding access to minority candidates."

You conclude that under California law the students under these circumstances are not "employees" entitled to "minimum wage or other protections afforded to employees under the wage and hour laws." You erroneously state that there are no "clear, published California guidelines on the subject" and, instead, you suggest that reliance on the U.S. Supreme Court case of *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1948) is appropriate. Actually, the six-point test announced in *Walling* has been expanded in California and the 11-point test historically used by the DLSE is published at §1.04[1][f] of Wilcox, *California Employment Law*.

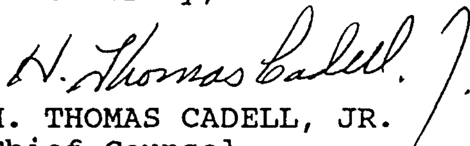
Since your analysis of the issue is not based upon the applicable test, it would be unfair to question your conclusion. We would ask that you reevaluate the situation in light of the 11-point test employed by the DLSE in California. However, we would point out that from the facts submitted, it appears to us to be difficult to conclude that the company does not derive "any immediate advantage from the activities of the students." These students are answering phones and performing filing, mail distribution, xeroxing, faxing and light typing. These are not difficult areas to master. However, we reserve judgment until you have an opportunity to analyze the facts in view of the correct law.

In addition to the issue of the "trainee" exempt status of the students you also mention that you have concluded that since your client, the company, does not "employ" the students, there is no need for a work permit. You infer that the students are volunteers.

You cite Education Code §49160 to support your contentions in this regard. Without at this time reaching the question of whether the company "employs" the students[1], we believe that you read the statute far too narrowly. Even a perfunctory reading of that section will reveal that it states that "[N]o person, firm or corporation shall employ, suffer, or permit any minor under the age of 18 years to work in or in connection with any establishment or occupation...without a permit." Clearly, the law does not require that there be an employment relationship *per se*. The law prohibits any person from "suffering or permitting" the minor to work without a permit. Thus, the students -- whether they are ultimately found to be "trainees" or not -- must have a work permit. You may wish to consult with the local superintendent of schools regarding the issuance of permits pursuant to Ed. Code §49113 or some other alternative plan.

If you desire, you may resubmit your request for an opinion regarding the exemption from the IWC Orders using the correct criteria.

Yours truly,



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Chief Counsel

c.c. Victoria Bradshaw

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[1] The students are not "volunteers" under the state guidelines even if they do meet the criteria used to determine if they are "trainees".

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