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*

June 17, 1994

Frank F. Sommers, IV
100 Bush Street, Suite 950
San Francisco, CA 94104

Re: **Overtime Requirements**

Dear Mr. Sommers:

The State Labor Commissioner, Victoria Bradshaw, has asked me to respond to your letter of May 3, 1994, regarding the pay plan of Exceller Golf, Inc. It is our understanding that there are currently two matters before the San Francisco Office of the Labor Commissioner which involve this particular pay plan.

In your letter you state that Exceller has always paid its instructors (with the exception of certain individuals who receive salary because either they also perform management functions or are highly accomplished golfers) on a commission basis. Previous to November, 1993, Exceller structured its commission compensation in the following manner: From December of 1992 (when Exceller began operations in California) until June, 1993, Exceller paid its instructors $1,800 per month against a 20% commission of all products[1] sold. After June, 1993, until November, 1993, Exceller paid its instructors a straight 60% commission.

In your letter you also mention that despite the fact that Order 10-89 covers persons employed in the Recreation and Amusement Industry and specifically lists "golf courses" among those industries, you feel that Order 4-89, is the appropriate order for the work these golf instructors perform. Order 4-89 is an occupational order which specifically covering "persons employed in professional, technical, clerical, mechanical, and similar occupations...unless such occupation is performed in an industry covered by an industry order of the Commission." As you can see, since the work is obviously covered by Order 10-89, Order 4-89 is not applicable.

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[1]The term products is contained in your letter and you give as examples of these "products" "lessons, clinics, and selected items such as instructional videos." Lessons and clinics are not "products" but, rather, are services.

In your letter you indicate that you feel that Order 10-89 covers "low skilled, manual occupations" and is not appropriate to the highly skilled golf instructors your client employs. It is difficult to agree with this since Order 4-89 specifically lists such occupations as "doorkeeper", "porters and cleaners", "bundlers" and "elevator operators" among the occupations it may cover. We don't think that these could be numbered among the "semiprofessional" occupations into which you place the golf instructors.

The fact that Order 4-89 lists among the occupations which it might cover the title of "instructor" is not dispositive. Instructors are used in many industries other than the Amusement and Recreation Industry and there may be situations where instructors are employed in occupations which are not specifically listed by an IWC Order.

Your letter indicates that you have chosen Order 4-89 as the appropriate Order so that your client may take advantage of subsection 3(C) which offers an exception for employees engaged in sales when those sales are compensated on a commission basis. See *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557. Inasmuch as the golf instructors are not engaged "principally" in sales (*Keyes Motors v. DLSE, supra*) the exemption under Order 4-89 subsection 3(C) would not apply even if that Order were appropriate[2].

We hope this adequately addresses the issues you raised in your letter. We want to thank you for pointing out that the issue is currently before the Labor Commissioner. We hope that this explanation will lead to an early settlement of the claims.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner
Lola Felix, Regional Mgr., North
Henry Huerta, Sr. Deputy Labor Commissioner

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[2]This result differs from the enforcement policy adopted by the federal Department of Labor, Division of Wage and Hour for purposes of the FLSA. See *Keyes Motors v. DLSE* (1987) 197 Cal.App.3d 557; 242 Cal.Rptr. 873