STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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GRAY DAVIS, Governor

November 2, 2000

Jan Gabrielson Tansil
Spaulding McCullough & Tansil
3550 Round Barn Blvd., Suite 306
Santa Rosa, CA 95402

Re: Farm Labor Contractor Status

Dear Ms. Tansil:

This letter is in reply to your request for an opinion regarding the status of an "Agricultural Employer" who provides vineyard preparation, planting, harvesting, and/or other related services, and also provides plants, fertilizer, equipment, expertise, labor, fuel, chemicals and other incidental materials. Your letter seeks an opinion as to whether the above-described employer would be a "farm labor contractor" under Labor Code Sections 1682-1699 under the scenarios you describe:

The scenarios are as follows:

(1) The Agricultural Employer receives a percentage of the grapes planted or harvested as compensation for the services and materials provided;

(2) The Agricultural Employer is paid a set dollar amount per ton of grapes harvested as compensation for the services and materials provided;

(3) The Agricultural Employer is paid a set dollar amount per acre prepared, planted or harvested as compensation for the services and materials provided;

(4) The Agricultural Employer receives reimbursement of certain non-labor expenses plus a percentage of the grapes planted or harvested;

(5) The Agricultural Employer receives reimbursement of certain non-labor expenses plus a set dollar amount per acre or ton.

You argue that under the scenarios listed, "the Agricultural Employer would not provide workers for a fee; rather, the services and materials would be compensated by means of one of the alternatives set forth above. The employees performing the field work would be employees of the Agricultural Employer and would be supervised by management employees of the Agricultural Employer. The workers would also perform such field work for the Agricultural Employer in its own fields/vineyards."

The definition of the term Farm Labor Contractor is found at Labor Code §1682:

> "As used in this chapter:
>
> (a) 'Person' includes any individual, firm, partnership, association, limited liability company, or corporation.
>
> (b) 'Farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons.
> ...
>
> (e) 'Fee' shall mean (1) the difference between the amount received by a labor contractor and the amount paid out by him or her to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him or her, and the amount paid out by him or her, for or in connection with the rendering of such services."

Clearly, as your letter concedes, the workers in question are employed by the "Agricultural Employer". They are employed by the "Agricultural Employer" to render personal services in connection with the production of farm products. The employment of the workers is "for" the benefit of a third party (the owners or lessees of the land). The "Agricultural Employer", according to the facts set out in your letter, at the very least supervises and

directs these workers and disburses wage payments to them. Under the definition contained in the Labor Code, it is obvious that the "Agricultural Employer" is a farm labor contractor.

Your letter appears to indicate that you feel that the *quid quo pro* received by the "Agricultural Employer" in the scenarios you set may not be "fees" as defined in the Code. The Division disagrees. The term "fee" is defined very carefully in Labor Code §1682(e) and includes not only a specified amount which the farm labor contractor may receive but "any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him or her, and the amount paid out by him or her, for or in connection with the rendering of such services."

Unlike the availability of liens in some industries, farm workers must rely on the employer who hires and directs their activities. The all-inclusive definition of "fee" found at §1682(e) was designed to protect workers employed by individuals who do not have a property interest in the acreage where they are engaged to render services by requiring that the employer be registered as a farm labor contractor.

You ask in your letter whether the fact that the workers were employed under the terms of a collective bargaining agreement would change the outcome. The answer is no. As you are aware, the case of *Livadas v. Bradshaw,* (1994) 114 S.Ct. 2068, stands for the proposition that the Division has jurisdiction over matters that have an independent state law basis, notwithstanding the existence of a CBA. (See also, *NBC v. Bradshaw,* (9th Cir.1995) 70 F.3d 69).

In addition, in response to the other questions you ask concerning the applicability of the farm labor contractor provisions, ownership of equipment or the plants or other materials used would be irrelevant to the issue of whether the "Agricultural Employer" you describe would have to register as a farm labor contractor in the scenarios you describe.

Your letter also sought the Division's opinion on questions involving the applicability of Order 14 to work performed by employees of an agricultural employer if:

(1) The agricultural employee performs landscaping or other outdoor maintenance (i.e., painting and repairing fences, outbuildings or farm roads on the winery or ranch property)?

Order 14, Section 2, subsection (C) (Definitions) provides that one is deemed to be "Employed in an agricultural occupation" if engaged in "the conservation, improvement or maintenance of such farm and its tools and equipment."

Thus, a bona fide agricultural employee performing landscaping or other outdoor maintenance on ranch (farm) property, would continue to be an agricultural employee subject to Order 14. On the other hand, an agricultural employee who performs those services on other than farm property is not "Employed in an agricultural occupation" and would be subject to whatever Order did cover the work. If an Agricultural employee is employed by the employer in an occupation which is not covered by Order 14 (i.e., landscaping work performed outside the farm), the employee becomes subject to the Wage Order covering the work performed. The monetary arrangement between the employer and the person on whose behalf the work is performed has nothing to do with the status of the employee.

As you can understand, it would amount to unfair to allow an Agricultural Employer to utilize Agricultural employees under Order 14 to perform landscaping work in competition with a landscape contractor who must meet the requirements of Order 5.

We hope this adequately addresses the issues you raised in your letter. Please excuse the delay in response; we thank you for your patience.

Yours truly,

Miles E. Locker

MILES E. LOCKER
Chief Counsel

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