STATE OF CALIFORNIA GRAY DAVIS, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

June 22, 2001

Kat Sunlove, Legislative Affairs Director
Free Speech Coalition
Office of Legislative Affairs
P.O. Box 907
Cool, CA 95614

Re: Gratuities to Dancers Employed Under IWC Orders 5 or 10

Dear Ms. Sunlove:

This is in response to your letter to Labor Commissioner Art Lujan dated December 20, 2000, in which you inquired as to meaning of the provisions in AB 2509 which amended Labor Code section 350(e) to provide that: "Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity." Specifically, you asked whether, as a result of this amendment, moneys collected by a dancer for (1) drinks sold, (2) T-shirts sold, or (3) dances sold to a customer, would "be deemed a gratuity" so as to entitled the dancer to keep said amounts.

In your letter, you argue that it would be unfair to the business owner to treat any of these amounts as gratuities, and that you believe the intent behind AB 2509 was merely to prohibit the employers of dancers from taking all or part of a dancer's gratuity, and that there was no intent to change the pre-existing definition of "gratuity." For the reasons discussed below, we believe you are incorrect as to the legislative intent. But although AB 2509 undoubtedly expanded the definition of a gratuity with respect to dancers, the expansion of the definition is limited to situations where the dancer receives money from a customer for *dancing*, as opposed to situations where someone employed as a dancer receives money from a customer for activities unrelated to dancing, such as selling T-shirts, serving drinks or food, etc.

In order to understand the distinction between these activities, it is important to understand the history behind both the law and the enforcement problems in the adult entertainment/exotic dance industry which led to the amendment of the term "gratuity."

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First, prior to the enactment of AB 2509, Labor Code section 351 provided (and continues to provide) that "no employer or agent shall collect, take, or receive any gratuity or part thereof that is paid, given to, or left for an employee by a patron , or deduct any amount from wages dues an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given or left for."

Prior to AB 2509, Labor Code section 350(d) defined gratuity to include "any tip, gratuity, money or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron." AB 2509 left this basic definition untouched, but added the above-referenced provision specific to dancers employed under IWC Orders 5 and 10. By adding this provision, *any amounts* that are directly paid by a customer *to a dancer*, are defined as a gratuity and are sole property of the dancer, notwithstanding "the actual amount due the business for services rendered." AB 2509 thus expanded the definition of a gratuity for dancers. By way of illustration:

A customer in a restaurant leaves $60 for the waiter, on a bill for $50. The waiter is entitled to keep only $10, the amount of the gratuity. The underlying $50 is "the actual amount due the business for services rendered or for goods, food, drink . . . sold or served to the patron," and this amount is collected by the waiter for delivery to the employer. In contrast, a patron at a striptease theater gives $30 to a dancer, consisting of $20 for the dance fee (which may have been pre-set by the employer) plus $10 as an additional amount for the dancer's services. Under AB 2509, the dancer is entitled to keep the entire $30.

If this same dancer also sells T-shirts at the theater, or also serves drinks or food to customers, she is then not functioning as a dancer, in which case the basic definition of gratuity under Labor Code section 350, rather than the special definition for dancers, would apply. As a caveat to this, however, please note that if the T-shirt sales are accomplished through dancing (e.g., while dancing, the dancer sells a shirt she is wearing to a customer so that the "sale of the shirt" is nothing more than a means of accomplishing a striptease dance) then the special definition would apply.

We must disagree with your contention that AB 2509's special treatment of dancer gratuities is "unfair to business owners." First, there are many

ways that an employer can still charge customers for the opportunity to view the employer's dancers. Admission fees, both as to the premises in general and as to that portion of the premises where dancing takes place, remain lawful, as long as the money is not paid directly to a dancer. Second, the enforcement history behind this legislation must be understood in order to reach a conclusion about what is fair. Over the past seven or eight years, the State Labor Commissioner's office has received substantial numbers of complaints from dancers about being forced to pay "stage fees" to their employers in order to be granted the "privilege" of working. These "stage fees," often in the amount several hundred dollars per shift, were taken from the amounts that customers paid to dancers for their services. Dancers' organizations were instrumental in supporting the legislation that clearly prohibits this practice.

Which brings us to our final point: the determination about what is fair or not, with respect to matters of employee compensation, rests soundly within the discretion of the California Legislature. Having considered this issue, the Legislature decided how the law should be changed. It is our mandate, as a labor law enforcement agency, to enforce these laws as they are written, regardless of any person's view of whether they are fair to business or labor. The public should never expect any less from our Division, and your concerns would best be directed to the Legislature.

Sincerely,

Miles E. Locker
Chief Counsel

cc: Art Lujan
Tom Grogan
Greg Rupp
Roger Miller
Nance Steffen
All DLSE Attorneys

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