STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Santa Rosa Legal Section
50 D Street, Suite 360
Santa Rosa, CA 95404
(707) 576-6788

H. THOMAS CADELL, *Of Counsel*

January 10, 2003

Robert L. Wenzel
Atkinson, Andelson, Loya, Ruud & Romo
17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-8597

Re: **Temporary Employment Agency Placements With Public Employers** (00142a)

Dear Mr. Wenzel:

I have been asked to respond on behalf of the Division of Labor Standards Enforcement to your letter seeking an opinion from the DLSE regarding the applicability of the Industrial Welfare Commission wage order to individuals employed by a temporary employment agency who are placed for temporary employment with various city, county, and other public employers.

We understand from your letter that your firm represents an employee staffing agency which places or leases employees on both a permanent and temporary basis with public and private employers throughout California. According to the facts you submit, with respect to these employees, the staffing agency acts as the employer of these individuals and charges its client, the employer with whom the employee is placed, an hourly fee for the services of the employee. The length of these leasing arrangements varies greatly depending upon many factors, including the needs of the employer with whom the employee is placed and the desires of the employee.

Frequently, a public employer will have an alternative workweek schedule in effect such as a 4/10 or 9/80 work schedule, and the public employer requires the leased employees to work these alternative workweek schedules. Since the Industrial Welfare Commission wage orders do not apply to public employers, you presume that these

alternative workweek schedules were not adopted pursuant to the election procedures contained in the wage orders.

You ask a number of questions related to the above-described facts:

1. Does Wage Order 4, or any wage order, apply to Staffing Agency employees for the period of time they are placed in employment assignments with a public employer?

Answer: As you know, IWC Order 4-2001, Section 1(B) provides:

> "Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district."

We cannot answer this question without knowing whether, in fact, the affected workers are "employees" of the public entity. Such a determination is fact-intensive and, according to the California courts, is not determined by the relationship between the public entity and your client. (Service Employees International Union v. County of Los Angeles (1990) 225 Cal.App.3d 761, review den.) It is not clear from the facts you submit whether the public entities exercise any control over the activities of the workers or if your client, in fact, exercises any such controls[1].

If, as experience teaches is the usual fact pattern, the public entity directs the activities of the workers, that public entity is the employer. Your client probably does not exercise any control over the details of the work performed

[1]An agent such as your client may be a joint employer, a dual employer or a special employer. (See *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405). However, such a relationship arises only where both the general employer and the special employer have the right to control the employee's activities. (*Ibid.*) Whether the right to control existed and was exercised is generally a question of fact to be resolved from the reasonable inferences drawn from the circumstances shown. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175, 151 Cal.Rptr. 671, 588 P.2d 811.)

by the workers and may be, at best, a joint employer. More likely, however, the staffing agency performs nothing more than a bookkeeping function, keeping track of the hours and making the checks out. If this is so, then the workers are employed directly by the public entity and the bulk of the wage order provisions would not apply.

On the other hand, in the event that your client does, in fact, direct and control the work functions, then your client is the employer and, as such, the employees may not, absent a validly adopted alternative workweek arrangement, be expected to work more than eight hours in any one workday without being paid the applicable premium for overtime.

2. If the wage orders do apply, which provisions apply to these workers?

Answer: Again, if the workers are, in fact, employed by the public entity, only Sections 1, 2, 4, 10, and 20 of the orders apply. If, on the other hand, they are not employed by the public entity but are, in fact, employed by your client, all of the provisions of the orders would apply.

3. If the wage orders apply, which entity is liable to the employee for violations of the wage order: the staffing agency, the public entity, or both?

Answer: If the wage orders apply it is because the workers are not employed by the public entity, but by the staffing agency. If that is the case, only the staffing agency would be liable for the violations.

4. If the public employer has an alternative workweek schedule in place which sets forth a regular schedule exceeding eight hours per workday but not over 40 hours in a workweek, such as a 4/10 or a 9/80, may the leased employee work the alternative workweek schedule without having to be paid daily overtime?

Answer: This would, of course, depend on whether the workers were employed by the public entity or were simply employees of the staffing agency as discussed above.

5. Are there any steps that can be taken, or specifc requirements which must be fulfilled, by either the staffing agency or the public employer, or both, that would allow the leased employee to work more than eight hours per day for the employer without having to be paid daily overtime?

Answer: Obviously, if the workers are employees of the public entity, then they are not subject to the wage orders and any work schedule which meets the requirements of the Fair Labor Standards Act would suffice. If the workers are not employees of the public entity they must be employees of the staffing agency. If the workers are employed by the staffing agency, they may petition the employer (the staffing agency) to hold an election to adopt an alternative workweek.

We are sorry that we cannot give you a more definitive answer to your questions; but as you can see, the question revolves around the status of the staffing agency and/or the public entity.

This agency takes no position regarding any other liabilities and responsibilities which the public entity might face when it hires its work force in this manner.

Yours truly,

H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
Regional Managers