

DEPARTMENT OF INDUSTRIAL RELATIONS

## DIVISION OF LABOR STANDARDS ENFORCEMENT

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January 13, 2003

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Re: **Request For Opinion Regarding Exemption Of Site Surveillance  
Technicians** (00142b)

Dear Mr. Fleck:

Your letter of May 29, 2002 (with attachments) has been directed to this office for response. In your letter you ask DLSE to opine as to "whether a Site Surveillance Technician ("SST") is exempt from California's overtime provisions as a professional employee. Initially, we must advise you that the DLSE does not render opinions regarding the exempt status of any specific employee or group of employees. While the duties and/or qualifications of any specific group of employees may be established by investigation for purposes of enforcement, DLSE has a long-established policy of not making such determinations based on nothing more than descriptions contained in correspondence.

We can, however, assist you in determining the status of the employee and we will be happy to do that.

Initially, we are confused by the law which you cite. You first direct our attention to Business and Professions Code Section 7052 wherein, you state, that statute describes the SST as "any person who acts as an independent onsite representative of an asbestos consultant who monitors the asbestos abatement activities of others, provides asbestos air monitoring services for area and personnel samples, and performs building surveys and contract administration at the direction of an asbestos consultant." Actually, B&P Code § 7052 simply provides an exemption for contractor's licensing requirements:

"This chapter does not apply to any person who only

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furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of the contractor."

And, of course, a contractor is, by definition, not an employee.

Our research has disclosed that Site Surveillance Technicians are defined at B&P Code § 7182, as follows:

"A 'site surveillance technician' means any person who acts as an independent onsite representative of an asbestos consultant who monitors the asbestos abatement activities of others, provides asbestos air monitoring services for area and personnel samples, and performs building surveys and contract administration at the direction of an asbestos consultant." (Emphasis added)

The description of a "asbestos consultant" is contained at B&P Code § 7181:

"An 'asbestos consultant,' as used in this chapter, means any person who contracts to provide professional health and safety services relating to asbestos-containing material, as defined in subdivision (b) of Section 6501.8 of the Labor Code, including building inspections, abatement project design, contract administration, supervision of site surveillance technicians as defined in Section 7182, sample collections, preparation of asbestos management plans, and clearance air monitoring." (Emphasis added)

Our research has disclosed that B&P Code § 7185 sets out the SST's minimum required qualifications as follows:

A person shall qualify as a certified site surveillance technician by meeting all of the following requirements: (a) Having six months of asbestos-related experience under the supervision of an asbestos consultant. (b) Possession of a high school diploma or equivalent. (c) Possession of a valid federal Asbestos Hazard Emergency Response Act (Subchapter II (commencing with Section 2641) of Chapter 53 of Title 15 of the United States Code) certificate for the type of work being performed, or its equivalent, as determined by the division. (d) Demonstration of proficiency by achieving a

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passing score, as determined by the division, on an examination approved or administered by the division covering the following subjects: (1) Physical characteristics of asbestos. (2) Health effects of asbestos. (3) Federal Occupational Safety and Health Administration, Division of Occupational Safety and Health, Environmental Protection Agency, air quality management districts, and State Department of Health Services regulatory requirements, including protective clothing, respiratory protection, exposure limits, personal hygiene, medical monitoring, and general industry safety hazards. (4) State-of-the-art asbestos abatement and control work procedures. (5) Industrial hygiene sampling methodology, including sampling techniques and recordkeeping. (Emphasis added)

The California Division of Occupational Safety and Health has adopted regulations which also describes SSTs and sets up a testing program. In part, the regulations at 8 C.C.R. § 1529(Q) provide:

“‘Site surveillance technician’ means any person who acts as an independent on-site representative of an asbestos consultant. The site surveillance technician monitors the asbestos abatement activities of others, provides asbestos air monitoring services for area and personal samples, and performs building surveys and contract administration at the direction of an asbestos consultant.”

The test given by Cal/OSHA covers the topics you outline in your letter at page 2. The topics cover points such as the physical characteristics and health effects of asbestos, the regulatory requirements of Fed/OSHA concerning protective clothing, respiratory protection, exposure limits, personal hygiene, medical monitoring, disposal, and general industry safety hazards. The SST must display knowledge of asbestos abatement and control work procedures and have information concerning industrial hygiene sampling methodology, including sampling techniques and record keeping. The type of knowledge one might typically acquire in six months of experience in the field.

The requirement of the successful completion of a test in order to be certified for certain occupations in California is not unusual. For instance, 8 C.C.R. § 291.1, et seq. explains the testing requirements for an individual employed as an electrician in this

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state; Health & Safety Code § 13177 requires that fire extinguisher testers pass an examination; Health & Safety Code § 107005 requires a test for x-ray technicians. None of these categories would be mistaken for a professional; but the duties performed by them impact on the health and safety of all California residents.

We think that it is important to note that your description of the duties of an SST appear to involve more responsibilities than the statutory definition of SST would infer. You describe those duties as "on site project manager who oversees asbestos and lead abatement crews from outside contractors...the individual primarily responsible for ensuring the safe removal of hazardous materials"). Frankly, this doesn't sound the same as the rather limited duties contained in descriptions we have found in the statutes.

It may be that the SSTs employed by your clients are performing as you describe - though a cursory reading of the statutory authority for the Site Surveillance Technicians would indicate that perhaps such performance was in excess of the limited authority they are granted - but this Division makes no pretense of having expertise in the area of asbestos removal. The discrepancy between your description and the apparent statutory limitations does, however, point out how difficult it would be to base a blanket exemption on a description provided in correspondence.

The DLSE has opined on the requirements to meet the exemption as either a "professional" or a "learned professional". In a recent letter (O.L. 2002.12.17, a copy of which is attached) we noted that:

"DLSE continues to require that the education of the individual consist of an 'advanced academic degree'. As recently as August 14, 2002, a DLSE Opinion Letter reiterated this policy. An advanced degree, as the name implies, means something above the usual. The typical degree received is the baccalaureate and only the additional education required for a degree in addition to the baccalaureate will meet the requirements of the exemption. We believe the California Legislature has also recognized this distinction. For instance, in defining the category of 'paralegal' at Business and Professions Code § 6450(c)(3), the statute requires that the applicant have a 'A baccalaureate degree or an advanced degree...' Clearly, the California Legislature recognizes the difference between a

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'baccalaureate' and an 'advanced degree'.

Further, we note that the American Heritage Dictionary defines the term "advanced degree" as "A university degree, such as a master's or doctorate, that is higher than a bachelor's". (American Heritage Dictionary of the English Language, Fourth Ed., 2000)

The educational requirements for a Site Surveillance Technician are "a high school education or equivalent". Obviously, that does not meet the advanced degree requirements of the exemption.

The IWC Orders also permit the exemption of employees who are "licensed or certified" in the named professions. Those exemptions are available to any employee who meets the licensing requirements of the State of California, regardless of education. Consequently, the employees you ask about may be exempt if they are licensed or certified by the state and is primarily engaged in that profession.

You ask, in your letter, whether the described employee(s) may be exempt as a "licensed engineer"? In order to meet the requirements for the licensed professional exemption, the worker must be engaged in the "licensed profession". The listed "professions" are recognized and licensed by agencies of the State of California which require substantial education as a prerequisite to engaging in that profession. Aside from the fact that the term "technician" does not correlate to "engineer", it is clear that simply being certified to perform an occupation (such as those certifications designed to meet the requirements of Cal/OSHA, the Health & Safety Code or the Labor Code) does not exempt the worker from the overtime requirements of the California Labor Code.

We hope this adequately addresses the issues you raised in your letter and that we have provided some guidance for you and your client. Thank you for your interest in California labor law.

Yours truly,

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Attorney for the Labor Commissioner

c.c. Arthur Lujan, State Labor Commissioner

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