STATE OF CALIFORNIA PETE WILSON, Governor

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November 6, 1998

John Hoang Sarvey
City Year San Jose/Silicon Valley
116 Paseo de San Antonio
San Jose, CA 95112

Re: **Employment Status of AmeriCorps Participants Under California Law**

Dear Mr. Sarvey:

This letter is in response to your request that the State Labor Commissioner review the opinion, initially expressed in a letter dated April 23, 1996 from former chief counsel H. Thomas Cadell, Jr. to James Phipps of the California Commission on Improving Life Through Service, that AmeriCorps "members" who work for private nonprofit organizations are not exempt from the minimum wage and overtime provisions of California's Industrial Welfare Commission ("IWC") orders.

Mr. Cadell's letter examined the issue of whether, as a matter of state law, AmeriCorps "members" are volunteers exempt from state wage and hour law, or whether they are employees within the meaning and coverage of the IWC orders. In reaching the conclusion that these "members" are employees, this opinion letter confined its analysis to state wage and hour law; that is, there was no discussion of whether the National and Community Service Act, 42 USC §12501, et seq., the federal law which created the AmeriCorps program, mandated a different treatment of these "members".

Insofar as the April 23, 1996 opinion letter discusses state wage and hour law, the conclusions expressed therein are accurate. The fact that AmeriCorps "members" receive payment (a monthly "stipend") for the work they perform for the nine to twelve month period of service with a private nonprofit organization, coupled with the fact that this organization pays the "members" (from funds received from AmeriCorps) and controls the hours and work performed by the "members" compels a finding, under California law, that these "members" are employees rather

than volunteers. And since there is no exclusion under the IWC orders for employees of private nonprofit organizations, these "members" are covered by state minimum wage and overtime provisions.

This, however, does not end our analysis. Since the AmeriCorps program is based on federal law, we must determine whether the federal law preempts application of state wage and hour law as to these AmeriCorps "members". The case of Pacific Merchant Shipping v. Aubry (9th Cir. 1991) 918 F. 2d 1409, 1415, teaches:

> "To decide whether a federal statute preempts state law, 'our sole task is to ascertain the intent of Congress.' [cite omitted] Federal law preempts state law if (1) Congress expressly so states, (2) Congress enacts comprehensive laws that leave no room for additional state regulation, or (3) state law actually conflicts with federal law. [cites omitted] States however, possess broad authority under their police powers to regulate the employment relationship to protect resident workers. [cite omitted] Thus, in addressing the preemption question before us, 'we start with the assumption that the historic powers of the States were not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress."

Using that analysis, the Pacific Merchant Shipping court concluded that California could apply its state overtime laws to seamen, despite the fact that the federal Fair Labor Standards Act expressly excludes seamen from its coverage. More recently, in Californians for Safe & Competitive Dump Truck Transportation v. Mendonca (9th Cir. 1998) 152 F.3d 1184, the court held that a federal law which expressly prohibited states from enforcing any law related to the prices, routes, or services of motor carriers did not preempt California's application of the prevailing wage law as to dump truck transportation.

We have carefully reviewed the National and Community Service Act to ascertain congressional intent as to whether state wage and hour law is preempted by the federal law. There is no question that under this federal law, AmeriCorps members are considered to be volunteers, not employees. 42 USC §12511 defines various terms used in the Act, and states that "[f]or purposes of this subchapter" an AmeriCorps "participant shall not be considered to be an employee of the program in which the

John Sarvey

participant is enrolled." This is not a global definition of the term AmeriCorps "participant"; that is, it only defines the term "for purposes of this subchapter" of the Act. It cannot be said that this definition expressly preempts state wage and hour law as it does not mention state law in any way. Had Congress intended to expressly preempt state wage and hour law, it could easily have done so by enacting language making AmeriCorps participants volunteers for state wage and hour purposes, or prohibiting states from applying state wage and hour law to AmeriCorps participants.

Turning to other provisions found in the National and Community Service Act, 42 USC §12594(b) provides for federal assistance to programs using AmeriCorps participants to cover payroll "taxes imposed on an employer" by the Internal Revenue Service arising out of the program's use of such participants. Indeed, AmeriCorps participants are subject to both federal and State of California personal income tax withholding. This provision of the Act evidences a congressional intent, at least for this purpose, to treat these participants as employees, and to treat the nonprofit organizations as their employers. Likewise, 42 USC §12631(a) provides that for purposes of the Family and Medical Leave Act "the participant shall be considered to be an eligible employee of the service sponsor."

In view of the areas in which the Act does treat AmeriCorps participants as employees, it is difficult to argue that the federal law implicitly preempts state wage and hour regulation. The fact that the Act establishes a monthly stipend for program participants does not necessarily lead to a conflict with state law. The monthly stipend will be enough to satisfy the requirements of state wage and hour law if, based on the number of hours worked by the participant, there are no state minimum wages or overtime wages owed. Alternatively, if the participant's hours are such as to create minimum wage or overtime liability, there is nothing in the Act that would prohibit the program from providing the participant with the required additional compensation. Furthermore, we were unable to find anything in the extensive legislative history which indicates a "clear and manifest" congressional intent to exclude these participants from state wage and hour law coverage.

There is another reason for our reluctance, as a state administrative agency, to refuse to enforce state wage and hour provisions as to AmeriCorps participants. Article III, Section 3.5(c) of the California Constitution provides that an administrative agency has no power "to declare a statute

unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that enforcement of such statute is prohibited by federal law or federal regulations." Labor Code §1185 provides that the IWC's wage orders "shall be valid and operative". Labor Code §1193.5 provides that the Division of Labor Standards Enforcement, the agency that is headed by the Labor Commissioner, shall administer and enforce the IWC orders concerning minimum wages and overtime. Labor Code §90.5 specifically charges the Labor Commissioner with the duty to "vigorously enforce minimum labor standards", including sections 1197 (dealing with minimum wages) and 1198 (dealing with overtime). Absent an appellate decision holding that federal law preempts our enforcement of these California statutes as to AmeriCorps participants, it is our duty to enforce the state law; to do otherwise would run afoul of Article III, section 3.5 of the California Constitution.

Please be assured that we understand the difficulties that may be faced by AmeriCorps programs stemming from the application of state wage and hour law. These organizations perform valuable services to the public at large, and program participants derive substantial benefits from their involvement that far transcend the rewards of a paycheck. It would be a terribly unfortunate consequence of our mandate to enforce state wage and hour law if any of these organizations were to limit or discontinue their use of AmeriCorps participants. With that in mind, we would suggest that perhaps the best way to address this problem would be through legislative change. The federal law could be amended to expressly exempt AmeriCorps participants from state wage and hour law. Alternatively (and probably more feasibly), a state law could be enacted to expressly exempt AmeriCorps participants from coverage of the IWC orders. We would certainly be willing to provide assistance in drafting such narrowly tailored legislation, and in supporting its passsage. Finally, you have the option of bringing a court action for declaratory relief to challenge our enforcement position. The drawback to that option, of course, is the unlikelihood of a court viewing this issue any differently than we do.

Finally, you have asked whether AmeriCorps programs may have certain participants' positions classifed as exempt based on the nature of their responsibilities and supervision. There are three basic exemptions from overtime under the IWC orders - -the executive, administrative and professional exemptions. Both the executive and administrative exemptions will not apply unless, as a threshold matter, the employee receives a salary of at least

$1,150 per month. It is my understanding that the monthly "stipends" paid to AmeriCorps participants fall substantially below that. In contrast, the professional exemption does not contain a minimum remuneration requirement. However, the professional exemption only applies to employees who are either licensed by the State of California in one of the following professions: law, medicine, dentistry, pharmacy, optometry, arcghitecture, engineering, teaching, or accounting; or to those employees who are engaged in an occupation "commonly recognized as a learned or artistic profession."

Thank you for your interest in California wage and hour law. Please feel free to contact this office with any other questions.

Sincerely,

Miles E. Locker
Chief Counsel

cc: John Duncan
Jose Millan
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