STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

April 11, 1994

Douglas A. Barritt
Payne & Fears
4 Park Plaza, Suite 1100
Irvine, CA 92714

Re: **Overtime Issues**

Dear Mr. Babbitt:

State Labor Commissioner Victoria Bradshaw has asked this office to respond to your letter of March 30, 1994, regarding overtime issues involving "assistant golf professionals".

It is our understanding that these assistant professionals are generally occupied manning the pro shop at your client's golf club. There are occasions, however, when the assistant professionals engage in teaching members the fine points of golf.

We assume from the facts you have given that the assistant schedules the teaching sessions and they are allowed to teach up to six half-hour lessons per week during their normal working hours. Although you don't state how the member pays for these lessons, the fact that the assistant is given an IRS 1099 form indicates to us that the cost of the lesson is paid to the Club and the Club pays all (or a percentage) of the amount to the assistant.

You have concluded that during the time which the assistant is engaged in teaching he or she is an independent contractor. You reach this conclusion, as we understand, based on the finding by your client that the club merely permits the assistant to teach on their premises, they pay no taxes on his behalf, and they furnish the professional with an IRS 1099. We think this is an erroneous conclusion.

The very title, "assistant professional" indicates that the individual is employed by the Club to aid the membership. One of the facilities a member of a golf club expects is access to a professional for the purpose of learning of the fine points of golf. The fact that the professional only spends a small portion of the employment in providing private lessons and the greatest portion of the time selling equipment and performing the duties of starter does not change this relationship to one of independent contractor during the time the professional is engaged in giving lessons.

In view of the fact that access to a professional is expected, having the professional available -- and accessible -- inurs, of course, to the benefit of the Club.

It seems that the relationship between the Club and the assistant professional is akin, for instance, to that between a riding stable and an individual who may, from time to time, give riding lessons. The individual spends most of his or her time in other duties around the stable but is accessible and available for lessons.

The fact that the payment schedule is different when the professional is engaged in teaching golf does not change the relationship to that of an independent contractor, either. There are many occupations which pay different hourly rates for performing one job as opposed to what is paid for performing another.

I suggest you review the case of *Borello & Sons v. DIR* (1989) 48 Cal.3d 341, 256 Cal.Rptr. 543, for an overview of the relationship of employer/employee versus independent contractor/principal. There is nothing in the facts you have submitted which would lead one to conclude that an assistant professional is other than an employee at all times when he is under the direction and control of the employer.

In view of the above conclusion regarding the relationship, we further conclude that the individual is entitled to recover overtime for all hours worked in excess of eight hours in any one day or forty hours in any one week. We should add that the sum received for the lessons must be included in the calculation of the regular rate of pay for purposes of overtime.

Thank you for your interest in California labor law. If you have any further questions please contact your nearest District office of the Division of Labor Standards Enforcement.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw