STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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MILES E. LOCKER, *Staff Counsel*

December 24, 1997

Also Sent by Fax
to (213) 620-1398

Richard J. Simmons
Sheppard, Mullin, Richter & Hampton
333 South Hope Street, 48th Floor
Los Angeles, California 90071-1780

Re: Determining the Applicable Wage Order
for Employees of Temporary Help Firms

Dear Mr. Simmons:

This is in response to your letter of September 29, 1997, to Labor Commissioner Jose Millan, concerning the above-referenced topic. In that letter, you state that it is your "understanding that the Division of Labor Standards Enforcement (DLSE) has historically maintained the enforcement position that employees of temporary help firms are governed by the provisions of Wage Order 4, irrespective of the industry of the employer to which they are temporarily assigned." For the reasons set forth below, we have determined that contrary to your assertion, this has not been DLSE's historic enforcement position, and that this will not be DLSE's enforcement position in the future.

Your letter fails to cite any documentary support for what you contend to be the DLSE's historic enforcement position. In fact, we have been unable to locate any opinion letters, interpretive bulletins, management memos, former operations manual provisions, or any other stated expression of such an agency policy. The DLSE pamphlet, "Classifications - - Which IWC Order?", published in 1986, makes no mention of any special policy for temporary help agencies. Moreover, an examination of the "Wage and Hour Manual for California Employers" (5th edition, 1994), which you authored, contains no mention of any DLSE policy concerning the coverage of IWC orders unique or specific to temporary help firms. Furthermore, my conversations with past and present DLSE supervisors and managers have failed to disclose the existence of any such "unwritten policy." In short, you are mistaken in your beliefs concerning DLSE's historic enforcement position in this area.

In fact, DLSE's enforcement position has always been, and remains, that employees of a temporary help agency are covered by the Industrial Welfare Commission order which applies to the industry in which these temporary employees are assigned. For example, if a temporary help agency assigns one of its employees

to a manufacturing company as an assembly line worker, that employee is covered by IWC Order 1, just like those other assembly line workers who are permanently employed by the manufacturing company. As Order 1 is an industry-wide order, rather than an occupational order, it covers all of the employees who are employed in that industry, regardless of their occupations. Thus, Order 1 applies not only to the manufacturing company's assembly-line workers, but also to its clerical employees. A temporary help agency that sends clerical employees on an assignment to work for a manufacturing company must, therefore, apply Order 1 to the work performed by these clerical employees.

Of course, if a temporary help agency assigns an employee to work at a business that is not covered by an industry-wide order, the employee will be covered by the appropriate occupational wage order. As most temporary help agencies seem to specialize in sending out employees whose work is covered by IWC Order 4 to businesses that are not covered by any industry-wide order, those temporary employees are covered by Order 4. But if that same employee is sent out by the temporary help agency to perform clerical services for an amusement park covered by Order 10, an industry-wide order, that employee is then covered by Order 10. To do otherwise would result in applying different wage orders to employees who are performing similar work in the same workplace, something we do not believe the IWC intended.

Moreover, to enshrine IWC Order 4 as a "default order" for employees of temporary help agencies, irrespective of the work performed and the industry in which this work is performed, would encourage employers covered by industry wage orders that continue to provide for daily overtime after December 31, 1997 to change their method of staffing so as to come under the provisions of Order 4. This would provide a competitive advantage to employers who use the services of temporary help agencies, and would lead to inconsistent application of overtime requirements as to businesses that compete against each other in the same industry. The IWC industry orders establish certain minimum labor standards and a level playing field in each of the various industries. The enforcement policy that you propose would subvert these standards and bring about the erosion of an industry-wide level playing field.

As you point out in your letter, however, enforcement difficulties may arise if the temporary help agency sends an employee to different businesses, covered by different wage orders, within a single pay period. Prior DLSE enforcement policy in this area has been to apply the appropriate wage order to the work being performed, even if that means that an employee is covered by different wage orders during a single pay period. Upon reflection, in response to the issues raised by your letter, the Division has concluded that for purposes of ease of

enforcement of overtime requirements, in those instances when an employee employed by a temporary help agency is sent on assignments to different businesses in the same pay period, and the work that is performed by the employee at these different businesses within a single pay period is covered by more than one IWC order, all of the work performed by that employee in that pay period will be subject to the overtime pay requirements of the IWC order under which the employee was primarily covered. Thus, an employee of a temporary help firm who is assigned to two or more different businesses within a single pay period, and whose work for each of these businesses is covered by separate wage orders, will have all of his or her hours for the pay period covered, for overtime purposes, by the one wage order under which the employee worked the greatest number of hours in that pay period.

Among the merits of this enforcement policy is the fact that it takes into account the actual work performed, the industry in which the work is performed, and the actual amount of time spent performing that work, in determining which IWC order controls. Under this enforcement policy, both the temporary agency that employs the workers, and the DLSE in auditing any overtime claims, will be spared the enormous burden of applying multiple wage orders to work performed within a single pay period.

Thank you for your ongoing interest in the development of California wage and hour law. Feel free to contact us with any other questions.

Sincerely,

Miles E. Locker
Attorney for the Labor Commissioner

cc: Jose Millan, Labor Commissioner
H. Thomas Cadell, Jr., Chief Counsel
Tom Grogan, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Nance Steffen, Assistant Labor Commissioner