STATE OF CALIFORNIA

PETE WILSON, Governor

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H. THOMAS CADELL, JR., *Chief Counsel*

March 5, 1997

Thomas L Miller, Esq.
3891 11th St
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Re: **Mark T. Blouin v. U.S. Truck Driving School, Inc.**
Case No. 10-27969-001

Dear Mr. Miller:

Deputy Lucille Ferrell of the San Diego office has sent me a copy of the correspondence you sent to her on February 25, 1997, regarding the above-referenced case. In your letter you take the position that a truck driving instructor, licensed and certified by the State of California, is an exempt employee under the learned or artistic professions provision of Order 4-89. You attach a copy of a letter from an Industrial Relations Representative sent to an individual in 1991 which indicates that the IRR had concluded that the truck driving instructors involved in that case did fall under the exemption; however, that decision was incorrect. The Division does not agree with the position you set out in your letter of February 25th for the reasons set out below.

In 1989, the IWC added the exemption for persons "engaged in an occupation commonly recognized as a learned or artistic professional" in Order 4-89 and provided in the Statement of Basis for that Order:

> "During its overtime investigation the IWC learned that the professional exemption, as distinct from the administrative or executive exemption contained in the IWC Orders, was too restrictive insofar as it did not recognize the societal and technological changes that have occurred and will occur in years to come. Emerging occupations, such as those in the <u>fields of science and high technology, and other occupations requiring advanced knowledge</u>, the exercise of discretion and independent judgment and/or invention, imagination or talent in a recognized field or artistic endeavor, while exempt under

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> federal law, rarely, if ever, qualified for a professional exemption under the IWC Orders. Testimony indicated that this differentiation generated confusion and resulted in disadvantages both to employees and employers. The IWC also received information about enforcement problems due to the fact that there was very little flexibility to interpret and/or enforce individual professional exemptions based on actual duties and responsibilities. In response to these concerns, and based upon evidence received in the CHA petition, written materials, and oral and written public testimony, the IWC decided that the professional exemption relied too much on credentialism. Consequently, the IWC proposed language which would add persons engaged in an occupation commonly recognized as a "learned or artistic" profession to the licensed professions already listed in the order. This broad language would eliminate the need for the IWC to modify the list (as it did to add pharmacists in 1979) each time it wished to recognize a new group as professionals, because it would allow enforcement staff to consider individual situations and actual duties when applying the exemption. The language also would permit, but would not be limited to, use of the federal guidelines for purposes of interpretation." (Emphasis added)

The IWC intended to add to the list of "professionals" which are specifically listed in the IWC Orders: "law, medicine, denistry, pharmacy, optometry, architecture, engineering, teaching, or accounting." These professions have one thing in common, those who practice these professions "requir[e] knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes." (See 29 C.F.R. 541.301, defining "learned" professions)

In your letter you attached two pages of Commissioner Aubry's three-page Interpretive Bulletin issued at the time of the IWC's adoption of the learned and artistic exemption. The third page of that directive states, *inter alia*:

> "As is always true in analyzing any of these exemptions, every case must be determined on its own merits. The letters and excerpts attached do not mean that every such person working in one of those occupations will be found to be either exempt or non-exempt."

This observation is especially true when applied to the term "teacher." Teachers are listed as one of the exempt professionals in the IWC Orders; however, the word "teacher" is specifically defined in those same Orders to mean those engaged in:

> "...the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university." (See IWC Order 4-89, subsection 2(M))

The truck driver instructors your letter addresses appear to have some "certificate of authorization for service" issued by the Council for Private Postsecondary and Vocational Education. Our information is that the course of study to become a truck driver instructor involves a total of 144 hours of classroom and on-site instruction. Aside from the fact that the certification held by the instructors does not meet the requirement of the California IWC Orders that the certificate be from "the Commission for Teacher Preparation and Licensing" (and there is no showing that the instruction is being performed in an accredited college or university), the course of study required clearly does not entail a prolonged course of specialized intellectual instruction and study.

You indicate in your letter that you believe that the federal regulations would exempt the truck driver instructors employed by your client. Without arguing your conclusion with you I would point out that the Fair Labor Standards Act exempts only:

> "...any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools..." 29 U.S.C. § 213(a)(1)

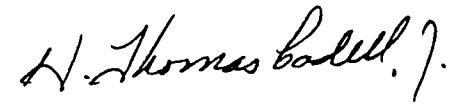
It may well be argued that the exemption you point to in the Code of Federal Regulations only applies to teachers engaged in teaching at the elementary and secondary level of academic schools. This argument seems to be buttressed by the language of 29 C.F.R. § 541.301(g)(1) and following sections. However, this is federal law and I will not attempt to give you legal advice in this area.

Notwithstanding the fact that federal law may or may not exempt your client's employees, it is obvious that the IWC did not intend that the term "teacher" as described in the Federal Regulations should supersede the definition they themselves had placed on the word in the California IWC Orders. (See IWC Order 4-89, subsection 2(G) cited above)

For the reasons stated above, the Division continues to take the position that truck driver instructors are not exempt under the "learned and artistic" exemption contained in the California IWC Orders. We are sorry if the letter from the Industrial Relations Representative in 1991 caused you or your client any inconvenience. It is our understanding that U.S. Truck Driving School has been cited on more than one occasion for its failure to pay the overtime premium owed to truck driver instructors. Thus, it would appear, your client knew of the position of the Division.

If you have any further questions regarding this case please direct them to Deputy Ferrell in the San Diego office.

Yours truly,



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