STATE OF CALIFORNIA PETE WILSON, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
45 Fremont Street, 32nd Floor
San Francisco, CA 94105

May 27, 1997

Thank you for your letter dated March 19, 1997 concerning promotional extras. I apologize for the delay in responding to your letter but some research had to be conducted prior to writing to you.

It is established law in California (Industrial Welfare Commission (IWC) Order 12-80, covering the motion picture industry) that an employer is any person who "directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." 8 CCR §11120 The word "employ" means to engage, suffer or permit to work.

IWC Order 12-80 also defines the term "extra player" to mean "any person employed by an employer in the production of motion pictures to perform any work, including but not limited to that of a general extra, stand-in, photographic double, sports player, silent bit, or dress extra; or as extras employed in dancing, skating, swimming, diving, riding, driving, or singing; or as extras employed to perform any other actions, gestures, facial expressions, or pantomime." The term promotional extra is not used in this rather broad definition of the term extra player, and the Dictionary of Occupation Titles published by the federal government, lists only the categories of "general extra", "special ability extra", and "silent bit extra" under the broad category of "extra".

The fact that an individual must "show up" is not, standing alone, indicative of an employer-employee relationship. By the same token, the fact than an individual is not required to "show up" is not indicative of other than an employer-employee relationship. For instance, it is not uncommon in the maritime industry to have "shape ups" where those who wish to work present themselves and are permitted to work. This is also a common practice in the agricultural industry.

Likewise, the fact (as you mention in your letter) that there is no guarantee that the individual will stay for the completion of the shoot is not indicative of the lack of an employment relationship. Any employee may choose to quit his or her employment at any time.

The Division agrees, as you state in your letter, that the use of extras who simply show up at the site of a movie production is historical in the entertainment industry. The use of these individuals without compensation to appear in the background has never seemed to be in issue and has been accepted by all concerned.

It seems the differentiation between paid extras and what you call promotional extras comes down to a matter of control. We would feel that persons who are invited to be in a crowd scene and are asked to perform only minimal activities (such as: When you hear "action", please cheer.) and are not required to perform that minimal activity, can wear whatever clothing they wish, can come or go as they please, and are absolutely certain from before they arrive on the set that they are not considered employees, and will not be paid, are not employees.

There is no bright line test for determining whether an individual will be considered an employee for minimum wage and other labor law purposes. The only definitive way to ensure that promotional extras are not employees would be to approach the legislature to clarify existing law so that promotional extras are excluded from the definition of employee.

Very truly yours,

John C. Duncan
Chief Deputy Director

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