STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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December 4, 1997

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Re: **Request for Opinion: Partners Under Prevailing Wage Law**

Dear Mr. Kovacich:

Your letter of July 17, 1997, addressed to Lloyd W. Aubry, Jr., former Director of the Department of Industrial Relations, was referred to this office for response.

The opinion you are requesting is whether partners who performed work on a public works project are required to be paid prevailing wages.

Under Labor Code section 1771, all workers who perform work on a public works project are required to be paid the prevailing wage rates as determined by the Director. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837, the court held that "By its express language, this statutory requirement is not limited to those workers whose employers have contractually agreed to pay the prevailing wage; it applies to '*all* workers employed on public works'." In interpreting Section 1771, the court emphasized the word "all". Labor Code section 1723 states that "workman" includes laborer, workman, or mechanic. Labor Code section 1772 provides that "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

Although there is no published California opinion which specifically states that partners are included in Labor Code section 1771, the Division was recently asked by the California Department of Transportation to assist them in a case where the issue was whether partners working on a public works project were required to be paid the prevailing wage. In that case, entitled *Standard Traffic Services v. Department of Transportation* (County of Shasta, Case No. 132667), the court found:

> "Labor Code §§ 1771 and 1774 are applicable to all workers, and those sections are not limited to "employees". The sections apply to partners who are performing the work."

The fact that the worker may be a partner does not alter the coverage. To exempt the partners from coverage would frustrate the purpose of the prevailing wage law and defeat the uniform application intended by the Legislature. Exempting the partners would create a devise where a group of workers could form a partnership to avoid paying themselves the statutory prevailing wages; being exempt from the prevailing wage coverage, the partnership undoubtedly would underbid other contractors.

The prevailing wage law is "designed to level the playing field among bidders on public works projects . . ." (*Associated Builders and Contractors v. Curry*, 797 F.Supp. 1528, 1536 (N.D. Cal.1992). To assure that all employers are competing on equal footing, the Legislature enacted Labor Code section 90.5 which states that it is the policy of this state to vigorously enforce minimum labor standards in order to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards. (see *Lusardi, supra*, 1 Cal.4th at 985)

The state prevailing wage law (codified in 1937) was patterned after the Davis-Bacon Act[1] (*California Division of Labor Standards Enforcement v. Dillingham Construction N.A. Inc.* (1997) ___ U.S. ___, 117 S.Ct. 832, 835; *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458 Fn.1, 127 Cal.Rptr. 799) and, thus, we can look to that federal law for some guidance. The federal cases interpreting the Davis-Bacon Act reveal that the principle requiring the payment of the prevailing wage to partners has been applied under that Act (40 U.S.C. §276a(a). In *Building and Construction Trades Department, AFL-CIO v. Reich*, 40 F.3d 1274, 1288 (D.C. Cir. 1994), the court stated that the legislative history reveals that Congress amended the Davis-Bacon Act in 1935 to eliminate the practice where partnerships were being formed between individual workmen to avoid paying the members of the partnership the prevailing wage rate.

In interpreting the Davis-Bacon Act, the U.S. Attorney General concluded that owner-operators of trucks engaged in highway

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[1]The provisions of Labor Code §§ 1720 *et seq.* are often referred to as the "Little Davis-Bacon Act".

construction are employed as laborers or mechanics and subject to the Davis-Bacon Act. (41 U.S. Op. Atty. Gen. 448, 500 (1960).) In *United States v. Landis & Young*, 16 F.Supp. 832 (W.D. La. 1935), the court held that a sole proprietor who subcontracted and performed the work himself is subject to the Davis-Bacon Act.

Likewise, the U.S. Comptroller General, following the opinion of the U.S. Attorney General and the case of *United States v. Landis & Young, supra*, stated in the *Matter of: T.W.P. Company*, 59 Comp.Gen. 422, 424 (1980) that "whenever a member of a partnership performs the work of a laborer or mechanic on a project that falls within the scope of the Davis-Bacon Act, the prevailing wage determination is applied."

I hope this adequately addresses the issues you raised in your letter to former-director Lloyd W. Aubry. Please excuse the belated response but, actually, your letter, which had been misplaced, did not again come to my attention until recently.

Yours truly,

H. Thomas Cadell, Jr.

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