STATE OF CALIFORNIA. PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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JOHN C. DUNCAN, *Director*

September 15, 1998

Assemblymember Thomas "Rico" Oller
P.O. Box 942849
Sacramento, CA 94249-0001

Re: **Labor Code section 1294.1**

Dear Assemblymember Oller:

This is in response to your letter dated July 28, 1998 in which you sought clarification of the Department of Industrial Relations' enforcement of child labor laws, and particularly, Labor Code section 1294.1. Your letter was motivated by concerns about possible uneven enforcement policies and you asked for suggestions for corrective legislation or administrative regulations. I have reviewed your concerns with the State Labor Commissioner, as it is the Commissioner's duty to enforce the various child labor statutes. The following responses are based on our review of the applicable law, which mandates the Commissioner's enforcement policy until the statutes are changed.

Labor Code section 1294.1 provides that "no minor under the age of 16 years shall be employed or ***permitted to work in*** . . . any occupation excluded from the application of Subpart C of Part 570 of Title 29 of the Code of Federal regulations, as set forth in Section 570.333 . . . thereof." Section 570.33(f)(4)expressly excludes "occupations in connection with construction (including demolition and repair)" from the application of Subpart C of Part 570. By this exclusion, minors under the age of 16 are prohibited from ***working in*** any capacity in construction, with the exception of "office work, or sales work . . . as does not involve the performance of any duties . . . at the actual site of the construction operations." That is because section 1294.1 prohibits ***both*** being "employed ***or*** permitted to work in" construction.

Labor Code section 1294.1 does not allow the Labor Commissioner to distinguish between for-profit businesses and

non-profit organizations, or between minors who are paid employees and those who are unpaid volunteers. The statute prohibits any person from either employing or permitting a minor to work in connection with construction, except in the capacity of office or sales work performed away from the construction site. It does not allow minors under the age of 16 to work in construction whether or not the minor has a work permit. Indeed, the Labor Commissioner would be required, under Labor Code section 1300, to cancel any work permit which could not have been legally issued to cover the work performed.

United States Supreme Court cases interpreting the Fair Labor Standards Act ("FLSA") as to whether a person providing service is an employee or a volunteer for FLSA purposes, do not provide useful guidance for enforcing California child labor laws, like Labor Code section 1294.1, which do not distinguish between minors who volunteer their services and those who are paid.

You ask whether there are exemptions from child labor laws for parents teaching their children how to work in a family business. Without an express statutory exemption, such an exemption cannot be inferred. The only such exemption, found at Labor Code section 1394, is expressly limited to agricultural occupations, to permit parents to employ their minor children, during times when school is not in session, to perform work on property owned, operated, or controlled by the parents. The various other exemptions from FLSA or state minimum wage and overtime requirements that you discuss do not apply to Labor Code section 1294.1. The fact that the Legislature had written in clear, albeit narrow, exemptions for some work makes it very difficult for the Labor Commissioner to think that the Legislature silently assumed that children who are working for parents were all exempt.

Your concern for uneven enforcement raised issues of penalty amounts. Labor Code section 1288 sets out the standards which guide the use of discretion in determining the amount of penalty for the various child labor violations. The Legislature has given the Labor Commissioner rather limited discretion in this regard. Section 1288 classifies the various child labor violations as either "Class A" or "Class B" violations. The classification is based on the underlying statutory violation. For example, any violation of Labor Code section 1294.1 is classified as a "Class A" violation. Section 1288 provides that a "Class A" violation "is subject to a civil penalty in an amount not less than $5,000 and not exceeding $10,000 for each and every violation." The statute further provides that "[w]illful or

repeated violations shall receive higher civil penalties than those imposed for comparable nonwillful or first violations, not to exceed $10,000." Thus, under this statute, the Labor Commissioner has discretion to impose a penalty within a prescribed range of $5,000 to $10,000 for each violation of Labor Code section 1294.1. The Labor Commissioner cannot impose a penalty above that range, nor can the Labor Commissioner go below that range once it is determined that the underlying statute has been violated. The Legislature has made it clear that the lower end of that range is appropriate for nonwillful or first time violations, and that the higher end of the range is appropriate for willful or repeated violations.

The statutory scheme provides for due process and hearing procedures to ensure fairness. Under Labor Code section 1299, any person may contest a child labor citation and penalty by so notifying the Labor Commissioner within 15 business days after service of the citation. The Labor Commissioner must then hold an evidentiary hearing, the conduct of which is governed by the Administrative Adjudication Act (Govt. Code §§11400-11470.50). In such a hearing, the Division bears the burden of proof as to all elements of the alleged violation. The person contesting the citation has the right to present evidence, to examine and cross-examine witnesses, and to present legal argument. Based on the evidence presented, the hearing officer must issue a decision either affirming, modifying, or dismissing the penalty assessment. The hearing officer's decision must be in writing, and must set forth the factual and legal basis for the decision. The person contesting the citation may seek review of the hearing officer's decision, within 45 days after service of the decision, by filing a petition for writ of mandate with the appropriate superior court. Proceedings on the writ petition are governed by Code of Civil Procedure section 1094.5. In these proceedings, the court reviews the record of the hearing before the Labor Commissioner in order to determine whether there was a prejudicial abuse of discretion; that is, whether the Labor Commissioner proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by the evidence. The court thus has the ultimate authority to review, and either affirm, modify, or eliminate, the penalty assessment.

As a general rule, deputy labor commissioners are instructed to issue child labor citations whenever they come across violations. Child labor violations are viewed as among the most serious matters addressed by the Labor Code. Any failure to vigorously enforce these laws would subject the Labor Commissioner to widespread attack from the Legislature, the

media, law abiding employers, and employee advocacy groups. The Legislature, at Labor Code section 90.5, expressly declared that "it is the policy of this state to vigorously enforce minimum labor standards . . . 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." This is, of course, particularly apt with respect to the unlawful use of minors on public works projects, as such projects are paid out of taxpayer money, and thus, are subject to tremendous public scrutiny. Employers are required to pay their employees the prevailing wage for work performed in connection with a public works project, and therefore, expect our Department to carry out our enforcement activities in a way that ensures a level playing field.

One of our pending court cases involves a child labor citation that was issued to English Construction Company for allowing two minors - - 15 and 12 years of age - - to perform prohibited construction work in the course of a public works project. The child labor violations, captured in photographs, compelled issuance of a citation to this public works employer.

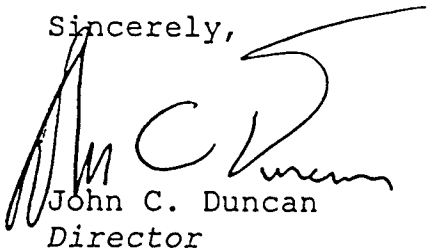
Of course, as you point out in your letter, there are numerous instances when non-profit religious, civic, or youth organizations such as the Boy Scouts contribute their services, as volunteers, to participate in construction projects for the betterment of the community. Needless to say, such volunteerism should be encouraged and fostered. Unfortunately, in enacting Labor Code section 1294.1, the Legislature failed to carve out any exemption for such situations. Any exemptions can only be created through legislation. Our Department cannot establish any exemptions by regulation, because any such regulation would be inconsistent with the existing statute, and thus, would be disallowed by the Office of Administrative Law and/or struck down by the courts. Likewise, our Department cannot establish exemptions through the publication of "binding guidelines" that are not adopted through the regulatory process or that are inconsistent with statutory provisions.

We would welcome the opportunity to work with you and the staff of the Assembly Labor and Employment Committee to help draft a bill that would carve out an exemption from Labor Code section 1294.1 for minors providing services as volunteers, under the close supervision of adults, on behalf of non-profit religious, civic or youth organizations, when engaged in the performance of construction projects undertaken by such organization as part of its mission. We believe that such a narrowly drawn exemption would help foster volunteerism while

maintaining protections for children and for law abiding for-profit businesses. It would be helpful, after the legislation is through, to propose it as a model for modification of the federal regulations.

Thank you for allowing our Department the opportunity to work with you in this matter.

Sincerely,



John C. Duncan
Director

cc: Jose Millan, State Labor Commissioner
John Rea, Chief Counsel
Terry Miller, Deputy Director, Legislation