STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

July 26, 1999

Nicolas P. Connon
Cochran-Bond & Connon
601 S. Figueroa Street
Suite 4200
Los Angeles, California 90017

Re: Applicability of the Administrative Exemption to Recruiters of Temporary Workers

Dear Mr. Connon:

This letter is in response to your request for an opinion letter regarding whether recruiters employed by your company are non-exempt employees for the purpose of overtime pay under California law. By letter dated June 4, 1999, you narrowed your request for an opinion letter to whether the administrative exemption for overtime pay applies to recruiters. Based on the description of duties of recruiters as provided by you, it would appear that recruiters employed by a recruting company would not be considered exempt employees under the administrative exemption.

You state that recruiting positions with this company are considered entry level positions. Once hired, recruiters are provided with training by the company. In general, two recruiters are assigned to a sales consultant who provides assignments to recruiters. Recruiters locate and hire temporary workers for clients of the recruiting company, gather information on potential temporary workers, which information is then inputed into a computer data base, occasionally meet the temporary workers at the job site to confirm attendance, and as needed, deliver paychecks to the temporary workers at their job sites.

Recruiters are paid a salary plus a small discretionary bonus you describe as "incentive pay". You state that recruiters are not paid overtime pay for hours worked in excess of 40 in each workweek. You further state that recruiters typically work 60 hours a week, with some recruiters working in excess of 95 hours in one workweek.

I note that in your June 4, 1999 letter you refer to my opinion letter dated October 5, 1998, regarding the applicability of the administrative exemption to insurance company claims representatives. In my October 5, 1998 opinion letter I explain the similarities and differences between federal and state law with respect to ascertaining the applicability of the administrative exemption. Since you have read my October 5, 1998 opinion letter, I will spare you an in-depth analysis of the administrative exemption. However, a brief overview may be of assistance.

Under California law, specifically Industrial Welfare Commission Order 4, Section 1(A), the administrative exemption does not apply unless the employee is engaged in work which is primarily intellectual, managerial, or creative, which requires the exercise of discretion and independent judgment, and for which remuneration is not less than $1,150.00. "Primarily" is defined under Section 2 of IWC Order 4 as "more than one-half of the employee's work time". And of course, in determining whether an employee is "engaged in" exempt or non-exempt work, the critically important question is what sort of work is the employee actually performing. In contrast, under federal law, the focus of the administrative exemption under 29 C.F.R. Section 541.2 is the "primary duty" of the employee without regard to the percentage of time the employee is engaged in administrative work. 29 C.F.R. Section 541.206. See *Ramirez v. Yosemite Water Company* (1999) 20 Cal.4th 785, 85 Cal.Rptr 2d 844, 852, fn.4.

Notwithstanding this difference between state and federal law, the Division of Labor Standards Enforcement does adopt federal case law and regulations with respect to the administrative exemption where such an interpretation would not be inconsistent with the more protective provisions of the Industrial Welfare Commission Orders. In this regard, DLSE has

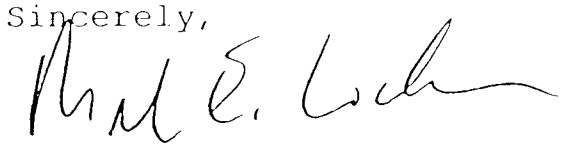
adopted the federal test under 29 C.F.R. Section 541.205, so that for the administrative exemption to apply, the employee must be primarily engaged in activities that are directly related to management policies or general business operations of the employer.

Activities directly related to management policies or general business operations have been construed to mean the running of the business and not merely carrying out the day-to-day operations of the business. *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1070. Where the primary duty of an employee is the production of a commodity which the business enterprise produces and/or markets, whether that commodity is goods or services, the employee is not engaged in activity directly related to management policies or general business operations, and therefore, the administrative exemption is inapplicable. Once it has been determined that an employee's primary function is production, any further analysis of whether the employee exercises discretion and independent judgment is unnecessary for purposes of the administrative exemption under 29 C.F.R. Section 541.2. *Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220, 1230.

The principal business of the recruiting company as described in your letter is to provide temporary workers on an as-needed basis for clients. Recruiters locate and secure the services of temporary workers on behalf of the recruiting company's clients. This is precisely the core function of a recruting company's business, in that the product or service it provides to its cusotmers is the recruitment of temporary workers. Consequently, the recruiter's duties fall within the purview of production work that is not directly related to policy making or decisions pertaining to general business operations. Based on the facts provided, there is no basis to conclude that the recruiters are exempt employees under the administrative exemption pursuant to federal or state law.

Thank you for your interest in California labor law. I hope this letter addresses your inquiry. Please feel free to contact the undersigned if you should have any further questions.

Sincerely,



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