

Your staff's research has disclosed the following:

1. [redacted] directly hires, discharges, and supervises all labor and employees required for the operation and maintenance of the contracted premises.
2. Identifying itself as the employer, [redacted] pays the salaries, payroll taxes, and workers' compensation premiums of the employees who work at the properties (including, but not limited to, resident managers, assistants, special assistants, maintenance and gardening personnel). However, the funds used for these purposes are drawn from a trust account, are easily segregated, and are reimbursed from appropriate owner accounts (comprised of rental proceeds or funds provided by the owner).
3. [redacted] reports all liabilities and withholdings for federal and state taxes, social security and unemployment and disability insurance fees.
4. There is no individual contract between each employee and [redacted] identifying the property owner as the employer.
5. Some properties being managed are owned by [redacted].
6. Not all property owners are corporations and, if they are considered the employer as [redacted] contends, no one property owner employs 50 or more employees.

Additionally, on March 31, 1997, I was contacted by telephone by a woman named [redacted] from [redacted]. She wanted us to know that when [redacted] files its tax return it does not record the money received from the property owners to pay the property employees as income, nor does it record as an expense the payroll for the property employees.

DISCUSSION:

As § 25205.6 provides, a fee is imposed upon each corporation identified in the schedule adopted pursuant to subdivision (a) of that section. The amount of the fee is determined under subdivision (b) of § 25205.6 according to the number of employees a corporation employs. As set forth in subdivision (d) of this section, the number of employees employed by a corporation is the number of persons employed in the state for more than 500 hours during the previous calendar year for which the fee is due. [redacted] is contending that it is not an employer of the 100+ individuals who appear on EDD account no. [redacted]. Given that there is no specific definition of "employ" or "employee" in the Hazardous Substance Tax Law, other sources must be considered to determine if the requisite employment relationship exists.

The California Labor Code, separate from the workers' compensation laws, defines employment as a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person. (Labor Code

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§ 2750). This contract need not be in writing. According to this statute, [redacted] would be considered an employer. By hiring, firing, and paying the individuals needed to maintain the property of [redacted]'s clients, [redacted] clearly "engages another, who is called the employee, to do something for the benefit of the employer or third person." (See Management Agreement, page 2, ¶3(c), attached hereto for your convenience).

Further support for an employment relationship can be found in common law. Common law has established several factors (for example, employment agreements, subjective view of the parties, and employer control over details and manner of performance) that can assist in determining if an employment relationship exists. The most significant factor tending to show employment is the right of the employer to control the performance of the work. (Witkin, 2 *Summary of California Law*, ch. II, §14 (9th ed. 1987)). According to the Sample Management Agreement provided to staff, [redacted] specifically retains all control to "hire, discharge and supervise all labor and employees. . ." (Management Agreement, page 2, ¶ 3(c)).

In addition to the factor of control over the individuals hired by [redacted], the facts establish that [redacted] pays the individuals their salaries, payroll taxes, and workers' compensation premiums (even identifying [redacted] as the employer), and reports all liabilities and withholdings. These facts are further evidence of an employment relationship between [redacted] and the individuals hired to maintain the properties [redacted] manages.

[redacted], however, appears to contend that it is not an employer of the property maintenance employees because (1) there is a specific contract provision which provides that the owner of the property shall be the employer, (2) the employees' salaries and taxes are paid from readily segregated sources and (3) for tax purposes, [redacted] does not record the money received for paying the employees' salaries as income, nor does it record the payment of the employees' salaries as an expense.

With respect to (1), while the terms of a formal written contract between parties may provide for a certain employment relationship,³ such provisions are not conclusive on the issue. In fact, courts frown on attempts to conceal employment by formal documents purporting to create other relationships and the courts have disregarded such terms. (Witkin, 2 *Summary of California Law*, ch. II, § 32 (9th ed. 1987)). The fact that [redacted] has retained total control over the individuals hired to maintain the properties (including hiring, firing, and supervision), far outweighs any arguably self-serving language in its contract to the contrary.

With respect to (2) and (3), the fact that the money comes from readily segregated sources and [redacted] does not record certain events as expenses or income on its tax return once again

³The specific language in this instance provides that "it being agreed that all persons other than contract labor, independent contractors, and the Agent's staff employees, while working on or about the Owner's property, shall be deemed the employees of the Owner and not of the Agent." (Management Agreement, page 2, ¶3(c)).

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cannot overcome the reality that [redacted] maintains all control over the property maintenance employees.

Based on the above, it is our opinion that, for purposes of § 25205.6, [redacted] employs the 100+ individuals reported on EDD account no [redacted].

Please feel free to contact me if you have any questions at 322-0438.

MGB:es
Attach.

cc: Ms. Mary Armstrong
Ms. Janet Vining
Ms. Judy Nelson
Mr. Dave McKillip (MIC:57)
Mr. Donald W. Prince (MIC:57)

" TYPICAL "

MANAGEMENT AGREEMENT

IN CONSIDERATION OF THE COVENANTS HEREIN CONTAINED,
_____, hereinafter called the "Owner", and _____
_____, INC., hereinafter called "Agent", agree as follows:

1. The Owner hereby employs and appoints the Agent as the exclusive Management Agent of the property or properties known as:

_____, California _____

and any personal property thereon belonging to the Owner upon the terms hereinafter set forth, commencing on the twenty-fourth (24th) day of June, 1994, and ending on the twenty-third (23rd) day of June, 1995, and thereafter for annual periods, unless on or before 60 days prior to the expiration of the initial term, or 60 days prior to the expiration of any such renewal period, either party hereto shall notify the other party in writing of an intention to terminate this agreement, in which case this agreement may be terminated.

2. The Agent accepts and agrees:

a. To furnish the services of the Agent's organization upon the terms herein provided for the operating and managing of the herein described premises;

b. To use reasonable diligence to enforce warranties given in connection with construction of the property and manufactured items included on the property;

c. From the rental proceeds or funds provided by Owner, to pay for advertising, utility and customary service bills, salaries of employees of the Property, (including but not limited to resident managers and assistants, special assistants and maintenance and gardening personnel), bookkeeping and computer charges, supplies and such repairs, decorations and alterations required in the discretion of Agent for the proper operation of the Property;

d. From the rental proceeds or funds provided by Owner, to service loans and mortgages and pay real property and personal property taxes and licenses, fees and payroll taxes incurred in connection with the Property and to pay for fidelity bond coverage for all personnel engaged in the operation of the

Property and such additional insurance as may be required in accordance with this Agreement and such other costs and expenses as may be required for the proper operation of the Property;

e. To render monthly statements showing receipts, distribute to Owner receipts less disbursements, charges, and reserves, at such place or places designated in writing by the Owner.

f. To deposit all monies collected in any Agent bank account, whose deposits are insured by FDIC, separate from Agent's personal accounts. The Agent shall not be held responsible in case of bank failure or bank closing, or other causes beyond the Agent's control.

3. The Owner hereby gives to the Agent the following authority and powers in addition to those specified in Paragraph 1 and agrees to assume the expenses incurred in connection therewith:

a. To advertise at Owner's expense the availability for lease of the herein described premises for any part thereof, and to display FOR RENT signs thereon; to sign, renew and/or cancel leases for the premises or any part thereof; to collect rents due or to become due; to terminate tenancies and to sign and serve in the name of the Owner such notices as are appropriate; to institute and prosecute legal action as hereinafter described in the name of (1) the Owner, (2) the Agent, or (3) an Assignee-Agent of Owner (to be designated by Agent). Said legal action may be: to evict tenants and to recover possession of said premises; to sue and to settle, compromise and/or release such actions or suits and/or to reinstate such tenancies. The Owner further agrees to reimburse the Agent for any costs incurred, including attorney's fees, in the legal action described above, whether or not legal suit actually is filed;

b. To make or cause to be made and supervise repairs and alterations, and to do decoration on said premises; to purchase supplies and pay all bills thereof;

c. To hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises; it being agreed that all persons other than contract labor, independent contractors, and the Agent's staff employees, while working on or about the Owner's property, shall be deemed the employees of the Owner and not of the Agent. It is understood and agreed that the Agent may perform any of its duties through Owner's attorneys, agents or employees, and shall not be responsible for their acts, defaults or negligence if reasonable care has been exercised in their appointment and retention.

d. To make contracts for electricity, gas, fuel, water, telephone, window cleaning, trash hauling, vermin extermination, and other services, or such of