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STATE OF CALIFORNIA

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March 21, 2006

Re: **REQUEST FOR ADVICE REGARDING WHETHER TIME OFF FOR VACATION, ILLNESS, AND OTHER PAID ABSENCES MUST BE COUNTED AS "WORK HOURS" FOR PURPOSES OF DETERMINING THE NUMBER OF EMPLOYEES UNDER THE ENVIRONMENTAL FEE**

Dear Ms.

This letter is in response to your e-mail inquiry of \_\_\_\_\_, addressed to Anita T. Garcia, Environmental Fees Section, Excise Taxes and Fees Division, of the State Board of Equalization (Board). In addition, thank you for the information you provided to me during our telephone conversation on March 9, 2006.

In general, you have asked for advice about completing form BOE-501-EF, the Board Environmental Fee return, as respects the number of employees who were employed by your corporation in California and who worked more than 500 hours in the previous calendar year, as stated on the form. Specifically, you have posed two question

- (1) Should "nonproductive hours" for absences due to vacation, illness, and holidays be included when calculating the hours each employee "worked"?
- (2) Should the hours used in calculating an employee's severance pay and vacation and sick time cash out when employment is terminated be included when calculating the hours the employee "worked"?

You also advised me that your corporation provides payroll and human resources services for its customers.

It appears that this is the first time this question has been posed to the Board. Unfortunately, the Environmental Fee statute in question does not provide a ready answer. The relevant provision in the statute reads:

For purposes of this section, the number of employees employed by a corporation is the number of persons employed in this state for more than 500 hours during the calendar year preceding the calendar year in which the fee is due.

(Health and Safety Code, section 25205.6, subdivision (d) [emphasis added].)

No other comments or information is provided in the Environmental Fee Law as to what constitutes "employed" or how the 500 hours should be calculated. Please note, however, that, regardless of what terms may be used in the Environmental Fee return or any Board publication, the operable term with regard to the "500 hours" is "employed," not "worked."

Turning elsewhere, the terms pertaining to employment and hours worked are generally defined in the California Labor Code (Labor Code), which governs employer-employee matters in California, in collaboration with the federal administrators of the Fair Labor Standards Act of 1938, title 29 of the United States Code, section 201 and following (FLSA). (Lab. Code, § 50.6.)

FLSA defines "employ" as "to suffer or permit to work." (29 U.S.C.A. § 203(g).) Case law provides some guidance, commenting that the definition of the terms "employee"<sup>1</sup> and "employ" under the FLSA "contemplate[] (a) a situation in which the employer . . . agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee." (*Huntley v. Gunn Furniture Co.* (W.D. Mich. 1948) 79 F.Supp. 110, 116 [cited by Ninth Circuit in *Gilbreath v. Cutter Biological, Inc.* (9th Cir. 1991) 931 F.2d 1320, 1330].)

The Labor Code itself provides only a few definitions, none of which are relevant to this inquiry. However, several relevant definitions are provided in regulations promulgated by the California Industrial Welfare Commission under the auspices of the Department of Industrial Relations and the Labor Code, specifically in section 11040 of title 8 of the California Code of Regulations (CCR). This section is also known, generally, as "Wage Order No. 4" and is applicable, as relevant here, to persons employed by private employers in California who are engaged in managerial, supervisory, clerical, and office work occupations, such as accountants, bookkeepers, clerks, computer programmers and operators, secretaries, and typists, which would appear to fit the operations of your corporation.

In Wage Order No. 4, "employ" is defined as "to engage, suffer, or permit to work." (8 CCR § 11040, subd. 2.(E) [emphasis added].) The addition of the word "engage" suggests that once a person is hired as an employee, that person is "employed," as the term is used in the Environmental Fee statute. However, Wage Order No. 4 also defines "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (8 CCR § 11040, subd. 2.(K) [emphasis added].)<sup>2</sup> This definition brings together the FLSA and Labor Code definitions of "employ" and the case law that discusses employer "control" in relation to the FLSA definition.

*Annotate* → Based on this discussion, it is reasonable to conclude that, <sup>B</sup>once a person is hired as an employee, the employer has control over how that employee spends the hours of the workday, including whether or not to grant paid time off during those workday hours for vacation, illness, and holidays and whether or not the employee must work his or her assigned hours on a particular workday. Therefore, for the purposes of the Environmental Fee statute and calculation

<sup>1</sup> "Employee" is defined by the FLSA as "any individual employed by an employer." (29 U.S.C.A. § 203(e)(1).)

<sup>2</sup> The FLSA also defines "hours worked," but the definition only deals with time spent "changing clothes or washing at the beginning or end of each workday," which is not at issue here. (29 U.S.C.A. § 203(o).)

*Annotation*  
of the number of employees "employed [in California] for more than 500 hours," the term "employed" includes the hours for which an employee is paid by ~~your~~<sup>the</sup> corporation, even while absent due to vacation, illness, or holidays, for the duration of his or her employment.

*Annotation*  
On the other hand, once the person is no longer employed by ~~your~~<sup>the</sup> corporation – i.e., is no longer "engage[d], suffer[ed], or permit[ted] to work," the employer no longer "has . . . control [or] determination of the hours of work" of the employee. Therefore, ~~it is also reasonable to conclude that~~ any hours included in the calculation of a terminated employee's severance pay or sick or vacation time cash out should not be included when calculating the number of hours a person was employed during a calendar year for purposes of determining the Environmental Fee owed by ~~your~~<sup>the</sup> corporation for that year.

Please let me know if there are other facts or circumstances of which I am not aware that might affect these conclusions. In addition, if you have any questions regarding the information provided above or would like further assistance regarding any of these matters, please do not hesitate to contact me at the above-referenced address and phone number.

Sincerely,

  
Carolee D. Johnstone  
Tax Counsel

cc: Anita T. Garcia, MIC:57  
Lynn Bartolo, MIC:57  
Jan Thurston, MIC:82  
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