STATE OF CALIFORNIA
PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
AL SECTION
an Ness Avenue, Ste. 4400
San Francisco, CA 94102

(415) 557-3827

April 19, 1991

Carol Goodman
Henning, Walsh & King
100 Bush Street, Suite 440
San Francisco, CA 94104

Dear Ms. Goodman:

This is in reply to your letter of March 28, 1991, requesting an administrative opinion. In your letter, you describe the following set of facts and ask for guidance regarding the application of overtime regulations to the employees which would be affected:

— "My client operates an employment agency which finds temporary employment positions for respiratory therapists at the Respiratory Departments of various hospitals with whom my client has contractual relationships throughout the Bay Area. Temporary placements can be for as short as four (4) hours or for as long as six (6) months. Sometimes my client will make permanent placements for which it will receive a fee. In general, my client is paid on an hourly basis for each hour of service performed by the respiratory therapist it has placed with a particular hospital. My client then pays the respiratory therapist at an agreed hourly rate. Sometimes the respiratory therapist will be paid directly by the hospital.

"— I believe that the respiratory therapists placed by my client are covered by Work Order 5-89 for the Public Housekeeping Industry.

"— Sometimes my client will be able to place a respiratory therapist at two or more hospitals during a work week. One of the problems necessitating this request for an Administrative Opinion Letter is that these hospitals may have adopted different work weeks for the employees in their various Respiratory Departments.

"— For example, my client may be able to place a respiratory therapist at Hospital A for three days. Hospital A has adopted a 3 day/12 hour work week. Later

> that week, my client is able to place the same respiratory therapist at Hospital B for two (2) days. Hospital B has a 4 day/10 hour work week."
>
> Your letter then asks the following questions:
>
> Is the respiratory therapist who my client places at Hospital A considered to be part of Hospital A's work week for the three days that he/she works at Hospital A? Is the respiratory therapist then considered to be part of Hospital B's work week for the two subsequent days that he/she works at Hospital B? In what cases, and how, is overtime compensation due and payable by my client to the respiratory therapists that it places?

You state that an additional complicating factor is that many hospitals with whom your client is attempting to contract insist that the respiratory therapists who are placed with them conform to the hospital's adopted work week schedule. In other words, a hospital which has adopted a 4/10 work schedule refuses to pay time and one-half for the hours in excess of eight in one day to your client for a respiratory therapist who works a 10-hour shift.

Initially, I would like to differentiate between those workers which your client "places" for which a normal flat fee or commission is paid for this employment agency type of place-ment and those workers for which your client is paid on an hourly or other basis for the placement. In the former situa-tion, the workers are employed by the hospital exclusively and any problem with the overtime calculation would rest with the hospital. In the latter situation, however, there is a joint employer relationship between your client and the hospital. Your client is simply renting its employees out on much the same basis as a company might rent its equipment.

Addressing the situation where there is a joint em-ployer situation, the employee must generally be paid overtime for all hours in excess of eight in any one day or forty in any one week. However, if the placement is in increments of a full week, the employee may be compensated according to the regularly scheduled alternative workweek adopted by the client company so long as that alternative workweek has been adopted in compliance with the provisions of the IWC Orders. If the placement is for

less than a full bona fide regularly-scheduled alternative workweek, the worker must be compensated at the applicable premium rates for all hours in excess of eight hours in any one day. In this regard, it should be pointed out that the obligation for insuring these overtime payments rests not only on your client, but is shared equally by the hospital employer.

Since your client is in a joint employer situation, any attempt to "place" workers for which it receives a fee other than a typical "placement" commission, with more than one em-ployer during a one-week period could result in your client being responsible for overtime premium if the worker exceeds the hours called for in a bona fide regularly-scheduled alternative workweek. Thus, in the example you refer to where the client places the worker for three days at a hospital which has adopted a 3/12 workweek and two days at a hospital with a 4/10 workweek the result would be that your client would be responsible for sixteen hours of time and one-half premium pay. This is so because your client's employee is not working a "regularly scheduled" workweek as required by the IWC Orders.

The IWC Orders do not purport to cover employment agencies. However, where the "employment agency" is simply acting as a temporary help agency which derives its compensation from the difference between the rate paid by the client employer and the rate paid to the worker[1], the "agency" is simply a joint employer. However, where an employment agency simply places workers for a flat fee or commission, the agency simply is not subject to the IWC Orders.

If the employee is permanently placed with the employer, the employee should, of course, be advised of any alternative work schedule in effect and agree to conditions existing concerning the hours and days of work.

I hope the foregoing information adequately responds to

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[1] This is not to say that there may not be other compensation plans which have not been brought to our attention which would also serve to take the "agency" out of the category of an "employment agency" and place it in the category of a "joint employer".

your questions and thank you for writing to us in this regard.

Very truly yours,

James H. Curry
Acting Labor Commissioner

JHC:oa

c.c. H. Thomas Cadell, Jr.