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June 25, 2003

VIA FACSIMILE AND E-MAIL

Stephen R. Jones
U.S. Department of Labor, Office of the Solicitor
Employment and Training Legal Service Division
Room N-2101, 200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Department of Labor, Office of Apprenticeship Training, Employer and Labor Services, Prosecuting Party v. California Department of Industrial Relations, Respondent
Case No. 2002-CCP-1

Dear Mr. Jones,

We were happy that in the call last week about the extension you were willing to address some of the misunderstandings, and possible intra office miscommunications, that led to the motion. Resolving what can be addressed without more paper and court time serves both our interests. I have contacted Mr. Wilkinson and we plan to meet this week.

In the hopes of either heading off or narrowing another dispute we would like to take the additional step of addressing a second issue, the claim that privileges have been waived. We disagree strongly with your contention that we have waived any privileges. As you may recall, when we spoke on March 27, 2003, we indicated that we had not withheld any identified documents from the response, but were still determining the proper scope of your request and interrogatories — and thus just which classes of documents (which might or might not involve privileges) were to be produced. Our response included objections based on the scope of your discovery requests and requests for clarification. Specific identification of documents subject to a privilege can only be done *after* we determine whether you narrow your request to exclude them or (as has happened in some responses) broadened your original request to include additional documents. When we discussed our concerns with you, you indicated you would attempt to clarify your requests and interrogatories. To that end, on April 7, 2003, you sent us clarification of your interrogatories and requests. We responded and pointed out areas where we still had concern. We did not hear anything further from you until your motion. It was our understanding that only after we reached agreement on which documents fell within the scope of your request could we then determine whether there were actual documents that we would assert were privileged.

For example, as we had concerns about the scope of your request for documents related to the "rationale" for the legislature's actions in amending the "need" standard to its present form in 1999, we said in our response both that we did not have that information, and we also asserted the legislator's privilege. Your clarification indicated that you were not seeking any documents from legislators, beyond those which are in the public domain (and which we identified for you in the legislative history) and so there are no documents for which that privilege now applies. We do not think that any court would find a waiver because of a failure to assert a specific privilege as to a specific document while the clarification and consultation process is on-going in the normal course of litigation discovery. In this case, the clarification eliminated that particular privilege question.

Likewise, it would have been inappropriate and a burdensome waste of time to identify specific documents that the process of clarification narrowed from the scope of the original request such as the boxes and boxes of litigation files concerning program approvals and ERISA preemption issues prior to 1995. Those numerous boxes, involving over a dozen pieces of litigation, obviously had extensive privileged communications among counsel, counsel to client, and the like. We think that exclusion from the scope of discovery was a good and welcome decision that eliminates any question about both production of those documents and exclusion of any privilege as to related documents.

Very truly yours,

Fred D. Lonsdale
Counsel

cc: Julian Standen, Deputy Attorney General
Office of the Attorney General