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June 30, 2004

To: Fred Harris

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Subject: District Ability to Count Amounts Paid to Outside Agencies as "Salaries of Classroom Instructors" under the 50% Law
Legal Opinion O 04-10

ISSUE

If an employee of an outside public or private entity teaches a course for a community college district, may the district count amounts paid to the entity for the instructor in the calculation of "salaries of classroom instructors" for purposes of Education Code section 84362?

CONCLUSION

A district may arrange to have courses taught by employees of public or private agencies. In some cases, the circumstances of the arrangement will demonstrate that a special or dual employment relationship exists between the community college district and the instructor. In such cases, the amounts paid by the district to compensate the instructor may be counted as "salaries of classroom instructors" for purposes of Education Code section 84362. If a special or dual employment relationship does not exist, the amounts paid cannot be counted. Whether such a relationship exists will depend on the specific facts of the arrangement between the parties.

BACKGROUND

Title 5 regulations provide considerable detail as to whether a district may collect apportionment for classes taught by outside entities. Under section 58058(b), the service of an individual employed by an outside agency qualifies as the service of an employee of the district for apportionment purposes so long as certain requirements are met including a contract that specifies "that the district has the primary right to control and direct the activities of the person or persons furnished by the public or private agency during the term of the contract."

This practice is often used in specialized areas such as police or fire training programs where employees of the outside agency possess specialized skills. In addition, we understand that apprenticeship programs also sometimes use this structure. The courses are generally taught by an employee of the outside entity as part of his/her normal workload, and the districts compensate the entity for the service provided.

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While title 5 regulations clearly permit payment of apportionment to districts under specified circumstances, sections 59204 et seq., which implement Education Code section 84362 (the 50% law) do not explicitly address the issue of whether amounts paid by a district to compensate employees of outside agencies who teach courses may be counted toward satisfying the district's 50% law obligation. Section 84362 provides that the salary that is to be counted for purposes of the 50% law is "the salary paid to each instructor employed by the district." Section 84362 also defines instructor for purposes of the law as "an employee of the district employed in a position requiring minimum qualifications. . . ." The clear intent of the 50% law is to ensure that public funds are sufficiently focused on instruction as opposed to administration and other support functions. Some districts have asserted that this intent should be applied to the issue of whether instruction offered in the manner described above may also be counted toward the 50% law requirement.

In 1984, Catherine Close opined that salaries paid to persons hired under section 58058(b) could be counted as "salaries of classroom instructors" for purposes of Education Code section 84362. She found that if the district "has the primary right to control and direct the activities of the person or persons furnished by the public or private agency during the term of the contract," the individual furnished by the contracting entity is an employee of the district under common law principles. (See Legal Opinion O 84-10.) In 2001 Paul Sickert reached the opposite conclusion. He did not believe that the language of 58058(b) informed the analysis of 84362. (See Legal Opinion L 01-32.) Because neither opinion fully considered the issue, we have reconsidered it and concluded that these two differing legal perspectives can be harmonized by a careful analysis of the situation.

Dual or Special Employment

The law recognizes that an employee can be employed by more than one employer simultaneously for the same services. There is typically a primary employer and a special or dual employer, and the main test of an employment relationship is the special employer's "right to control the manner and means of accomplishing the result desired." (*Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal.3d 943, 946.) However, a pervasive theme of court opinions on this topic is that dual or special employment analysis requires a number of factual determinations. A mere statement of control by a district will not suffice.

At issue in *Tieberg* was whether a television producer was required to make unemployment insurance contributions on behalf of freelance writers. The trial court relied on a contract that gave the producer "the right to control and direct the writers' services and because [the producer] exercised this right." (*Id.*, at p. 949.) The Supreme Court found that the trial court should not have restricted its review to the ability to control the work contractually, but should have considered other elements as well: "the [trial] court, in determining that [the producer] was an employer, improperly restricted its consideration to whether [the producer] had the right to and did exercise control over the writers' work. . . ." (*Id.*, at p. 946.) The Supreme Court then assessed some of the factors that the trial court had not (e.g., the writers were engaged in a distinct occupation, the work involved skills, the writers did not work on the premises, they were employed only for a particular play, they were paid by the job rather than by the hour, they had

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their own tools (typewriters and paper)) to determine whether there was an agreed upon employment relationship. The Court ultimately concluded that the trial court had reached the correct decision even though it had not fully considered the elements that go into an analysis of whether an employment relationship exists.

In *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, Shell Oil Company hired the Peterson Company (Peterson) to perform maintenance work at the Shell refinery in Martinez. Shell and Peterson entered into a written agreement that provided that Peterson would be the general employer of Peterson employees and Shell would be their special employer. The contract gave Shell "the right to fully control the details and means of doing the work hereby contracted for", but the contract also vested supervision of Peterson's employees in Peterson. Kowalski, one of the employees provided by Peterson, amputated his arm with a saw that was provided by Shell. When Kowalski sued Shell to recover damages, Shell claimed that Kowalski was its employee whose exclusive remedy was workers' compensation.

The California Supreme Court noted that the contract between Peterson and Shell was ambiguous. *Kowalski* provides that,

"[s]ince a contract is not conclusive evidence of the existence of the right to control, the courts have looked to a number of factors as evidentiary indicia of the existence of a special employment relationship. 'The paramount consideration appears to be whether the alleged special employer exercises control over the details of [an employee's] work. Such control strongly supports an inference that a special employment exists.' [Citations omitted.]" (*Id.*, at p. 176.)

Kowalski notes various factors that support the finding of a special relationship: the power to discharge a worker, "the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools." [Citations omitted.]" (*Id.*, at p. 177.) Payment of wages is not determinative, but it appears to be a factor to consider. The *Kowalski* Court noted that the existence of a special employment relationship tends to be indicated when

"(1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used. . . . [E]vidence to the contrary negates existence of a special employment relationship." (*Ibid.*)

Another factor is whether the employee consented to the special employment relationship with the understanding that he/she may forego the ability to sue the special employer at common law for negligence, and whether the parties believed they were creating an employment relationship. (*Id.*, at p. 178, and fn.10.) The court concluded that there was not a special employment relationship.

Finally, *Kowalski* discusses the importance of analyzing the degree to which the purported special employer actually supervises the employee's work.

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"In the present case, the uncontradicted evidence shows that Shell did not exercise any control over Kowalski's duties. He was at all times under the direct supervision of Peterson's carpenter foreman. Shell's carpenter foreman, the person most likely to have the authority to direct the details of Kowalski's work, testified that he had no such right, had never supervised Kowalski, and did not know of any Shell employee who did. Shell's carpenter foreman and the manager of its safety department, as well as Peterson's carpenter foreman, testified that Shell's involvement with Peterson's carpentry crew was limited to the giving of instructions as to the size and locations of scaffolds needed by Shell." (*Id.*, at p. 178, emphasis added.)

A year after deciding *Kowalski*, the California Supreme Court again addressed special employment relationships in *Marsh v. Tilley Steel Company* (1980) 26 Cal.3d 486. The Court again noted that a special employment relationship "flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Id.*, at p. 492.) It also noted factors that tend

"to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Id.*, at p. 492.)

Of course, some of these factors are difficult to apply to a higher education setting. For example, it is unlikely that the same level of control over details of the work could be expected over individuals teaching college-level classes. Among other things, control over the details of the work would likely violate academic freedom rights. We have not located any school or college decisions concerning special employment relationships such as that under consideration here. The factual setting coming closest to the situation we are trying to assess involved training activities within police agencies.

Three cities (Palo Alto, Mountain View, and Los Altos) essentially pooled their police resources to establish a regional SWAT team. A Palo Alto officer was killed due to the alleged negligence of a Mountain View employee. In response, Mountain View asserted as one of its defenses that it was the special employer of the Palo Alto officer so that his family would be limited in recovery to workers' compensation death benefits. (*Brassinga v. City of Mountain View, et al.* (1998) 66 Cal.App.4th 195.)

The Court emphasized that a "borrowing employer" does not need to have all the right of control for a special employment relationship to exist. (*Id.*, at p. 216.) *Brassinga* described factors that suggest control and so-called "non-control" factors that must be explored in determining whether a special employment relationship exists. (*Id.*, at p. 217.) Because the case was on appeal from summary judgment and a directed verdict, these matters had not been fully considered by a jury, so the court remanded for the numerous factual determinations needed to establish whether a special employment relationship existed.

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The California Supreme Court recently addressed the issue of employment status under a particular statute with respect to retirement benefits. (*Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491.) Metropolitan Water District of California ("MWD") is a public agency that contracts with CalPERS for retirement benefits for its employees. MWD hires its own employees under a system that describes selection procedures and that establishes a merit system. MWD also contracts with private labor suppliers to provide additional workers that MWD classifies as "consultants" or "agency temporary employees." These workers are not provided with the benefits described through the merit system and they are not enrolled for CalPERS retirement benefits.

A number of these workers who were hired through labor suppliers claimed that they are the common law employees of MWD and should therefore be enrolled for CalPERS benefits. The Supreme Court limited its consideration to the question of whether the Public Employees' Retirement Law (PERL) "requires enrollment of all common law employees." The Court provided language that could be applicable:

"Suffice it to say that plaintiffs alleged, and have produced some evidence to show, that they worked at MWD for indefinite periods, in some cases several years; that MWD managers interviewed and selected them for employment; that they were integrated into the MWD workforce and performed, at MWD offices or worksites, duties that are part of MWD's regular business; that MWD supervisors directly oversaw and evaluated their work, determined their hourly rates of pay, raises, and work schedules, approved their timesheets, and had the power to discipline and terminate them; and in general that MWD had the full right to control the manner and means by which they worked, while the labor suppliers merely provided MWD with 'payroll services.' Such facts, if proven, might support an argument that plaintiffs are MWD's employees under the established common law test. . . ." (*Id.*, at pp. 498-499.)

Thus, the Supreme Court repeatedly stated the need to look at specific operational features of the relationship in assessing whether an employment relationship exists. It is clear that the determination of whether there is a special or dual employment relationship is very fact-driven, and the existence of a regulation (title 5, § 58058(b)) and contractual documents authorizing a district to control and direct the employee are insufficient, by themselves, to support a special employment relationship. An appendix attached to this opinion lists some of the factors that may be used to determine the existence of a special employment relationship.

Impact of a Dual or Special Employment Relationship

It is also important to recognize that if the conditions for the establishment of dual or special employment described above are present, the employment relationship exists whether a district wants it or not. If there is such a relationship, all the accoutrements of employment could apply. It may be possible for an employer and an employee to pick and choose various elements to form the employment relationship, but the case law suggests that a court would not allow a district to label a person an employee for purposes that benefit the district (such as counting the

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compensation for 50% law purposes) and then to disclaim the status for purposes that benefit the employee (such as retirement benefits or rights to faculty union representation).

One of the most critical consequences flowing from a district's determination that an employment relationship exists is the obligation the law imposes on the district to classify that employee as "a contract employee, regular employee, or temporary employee." (Ed. Code, § 87604.) Presumably, a district would classify an instructor supplied by an outside agency as a temporary employee, and districts would need to take the normal precautions to ensure the temporary employee did not inadvertently achieve probationary status.

A number of other potential employment-related issues may arise. If a police agency assigns one of its officers to teach a class for a district, which union represents the officer – the peace officers association or faculty union? There may be compensation issues as well. If the officer injures someone, the question of district liability is present, and if the officer is injured, workers' compensation is implicated. Districts asserting special employer status may be liable for retirement contributions, and districts should be prepared to accept responsibility for such individuals under nondiscrimination laws. However, it should be noted that most of these issues can be addressed contractually. For example, the district can require the outside agency to indemnify the district.

In addition, there are other potential ramifications that are peculiar to community college district employment. For example, special employment would not be exempt from open recruiting requirements, and background checks that are required for district academic employees could be required. Unless collective bargaining agreements provide to the contrary, special employees could be subject to the same conditions as other faculty, including evaluation processes, office hour requirements, attendance at departmental meetings, collective bargaining rights and responsibilities, and other applicable terms and conditions of employment. However, because of the unique and specialized nature of the classes, these requirements do not seem to make sense and employee unions may agree to special provisions.

To summarize, where an employee of an outside public or private agency teaches a course, the ability of the district to count compensation paid the instructor toward satisfaction of the 50% law will depend on whether or not the actual circumstances of the relationship indicate that the instructor is a special employee of the district under common law principles. If so, the district will be able to count the amounts it pays toward compensation of the instructor as "salaries of classroom instructors" for purposes of Education Code section 84362.

The appendix attached to this agreement lists some of the factors that districts should consider to determine whether the instructor is a special employee. As explained above, the answer will depend on the particular circumstances of the arrangement. Clearly, the existence of a contract will be a very important consideration, but it is not sufficient by itself to establish a special employment relationship.

Districts are likely quite familiar with assessing whether individuals from whom they secure services are independent contractors or district employees. Federal Internal Revenue Service regulations describe "Who are employees" (26 C.F.R. § 31.3121(d)-1) and the IRS offers

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assistance to employers in making this determination through its Employer's Supplemental Tax Guide (Publication 15-A, revised January 2004) that addresses the classification of persons as independent contractors or employees.

Whether the instructors supplied by an outside agency remain only the employees of the general employer or are also the special employees of the district will depend on factors similar to those used for assessing independent contractor or employee status. This is not surprising because the underlying question is whether the district and the individual act as though the district is an employer and the individual is an employee. It might be helpful if the person or persons responsible for this determination are consulted on the special relationship question.

To establish a special relationship, it is not necessary that all of the factors favoring a special relationship exist. Typically, there will be a mixture of factors favoring and disfavoring a special relationship. It may be advisable for districts to consult with legal counsel.

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Appendix

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Factors that suggest a special employment relationship with a district.

Contractual employment relationship. There is a contract that indicates the parties intended to create an employment relationship. A contract between the district and the agency indicates that the individual is the special employee of the district. However, the actions of the parties may override a contract provision that is inconsistent with that conduct.

Contractual right of control. There is a contract that states that the district has the right to control the details of the work. However, such a statement can be overcome by contrary facts – i.e., that there was no such control.

Actual control of the work. Evidence by contract or otherwise, that the district has the right to control and direct the activities of the alleged employee or the manner and method in which the work is performed. The district actually exercises control over the details of the individual's work as opposed to giving instructions only as to the result to be achieved.

Consent. The individual gave informed consent to a special employment relationship with the understanding that an employment relationship could remove the ability to sue the special employer at common law for negligence.

Furnishing equipment/tools. The district provides the equipment or the work tools needed for performance.

Place of performance. The work occurs on district premises.

Training. The individual receives ongoing training and/or evaluation from the district concerning the work to be performed for the district.

Integration of individual into district operations. The individual follows district procedures in performing the work and the work is monitored by the district.

Payment of wages. The district determines the rate of pay and raises. The district pays wages directly to the individual. Payment of wages is not, however, determinative of the type of relationship.

Right to terminate. The district has the power to discharge the individual. The district could complain to the general employer about the work performance and have the individual disciplined.

Type of work. The work is unskilled and a part of the district's regular business.

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Length of service. The period of service is lengthy.

Factors that do not suggest a special employment relationship with a district.

Control of result only. District instructions relate only to the work result to be achieved.

Type of work. The individual is a skilled worker who retains discretion as to how to provide services so as to achieve the results the district wants.

Lack of supervision. District supervisory personnel do not interact in a meaningful way directly with the individual or they explain what is needed to the general employer rather than to the individual.

Multiple assignments by general employer. The individual is not regularly assigned by the general employer to work for the district, but has also been assigned to work elsewhere.

Lack of consent. The individual is not aware of a contract between the district and the general employer that describes an employment relationship and did not give informed consent to being a special employee of the district.

Payment of wages. The individual is paid for service to the district through the general employer's payroll.

Furnishing equipment/tools. The individual uses tools and equipment provided by the general employer.