



October 19, 2004

FLSA2004-16

Dear **Name ***,

This is in response to your letter concerning the 1969 Stipulation that your client, **Name ***, entered into with the Department of Labor. The Stipulation was also the subject of our meeting here in Washington, and we thank you for the helpful information you have provided.

The purpose of the Stipulation was to establish the conditions under which people attending training courses sponsored by **Name *** would be considered employees under the Fair Labor Standards Act, 29 U.S.C. 201 et seq. ("FLSA"). The Stipulation also was intended to provide a standard for **Name *** and its franchisees to insure that they were in compliance with the FLSA with regard to their trainees.

Name * offers training in the tax code and the completion of tax returns for the company's customers in courses which are open to the public, including **Name *** competitors. The trainees are not guaranteed employment with **Name *** but a significant number are ultimately employed by **Name ***. **Name *** franchisees conduct the same training under the same conditions as **Name ***. **Name *** and its franchisees wish to screen applicants to its courses, and screening criteria would include the applicant's current or possible future employment with a competitor of **Name ***.

As you point out, since the Stipulation was signed, a number of cases have been decided concerning whether individuals engaged in pre-employment training may be considered employees under the FLSA. See, e.g., McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989); Donovan v. Trans World Airlines, 726 F.2d 415 (8th Cir. 1984); Donovan v. American Airlines, 686 F.2d 267 (5th Cir. 1982).

Based on the holdings in these cases, the Wage and Hour Division issued an opinion letter dated January 30, 2001, 2001 WL 1558755 (DOL WAGE-HOUR), which you have cited in your letter. The opinion letter describes the circumstances under which trainees are considered to be employees, taking into account the changes that have occurred in this area of the law since 1969. In view of the guidance provided in the opinion letter, the 1969 Stipulation is no longer binding on **Name *** or its franchises.

We do not believe that it is necessary to enter into a new stipulation. The January 30, 2001 opinion letter provides the guidance necessary to achieve FLSA compliance under these circumstances, stating the six conditions the Wage and Hour Division considers necessary for such trainees not to be considered employees (which are set out below).

The FLSA applies to individuals who are "employees", as that term is interpreted under the Act. The term "employ" is defined in section 3(g) of the Act, 29 U.S.C. 203(g), as "to suffer or permit to work." Ordinarily that term is defined broadly, but its reach is not unlimited. The Supreme Court has held that individuals working for another for their own benefit without expectation of compensation may not be employees. See Walling v. Portland Terminal Company, 330 U.S. 148 (1947). Whether trainees are employees under the FLSA will depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six of the following criteria apply, the trainees are not employees within the meaning of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees.
3. The trainees do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees; and on occasion operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.



If **Name *** and its franchisees conduct their training operations in a manner consistent with these six criteria and the guidance in the January 30, 2001 opinion letter, their trainees will not be considered employees under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that the above information is responsive to your concerns.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*