OFFICE OF THE DISTRICT COUNCIL ATTORNEY
MASSACHUSETTS & NORTHERN NEW ENGLAND
LABORERS' DISTRICT COUNCIL
OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

John H. Ronan, Esq. October 28, 2019
General Counsel
Executive Office of Labor and Workforce Development
Department of Labor Standards
19 Staniford Street (2nd Floor)
Boston, MA 02114

Re: Northern Tree Service, Inc. (August 22, 2019 Request for Clarification)
By email (John.Ronan@mass.gov) and First Class Mail.

Dear General Counsel Ronan:

We very much appreciate being allowed to participate in the October 24, 2019 hearing (and lively discussion) covering Northern Tree Service's above-captioned requested clarification. For the reasons outlined herein, we are respectfully suggesting that it is unnecessary to either revisit, or revise, the Department of Labor Standards' March 13, 2014 Official Opinion Letter confirming the construction classification of "Laborer: Tree Remover", and the non-construction, utility work classifications of "Tree Trimmer" and "Tree Trimmer Groundman".

We are further respectfully noting that the tree removal work in question has been considered "construction" over the past quarter century and that this long-standing interpretation was most recently outlined, and confirmed, in the March 13, 2014 Opinion Letter issued by DLS. Therefore, this work should clearly **not** be classified under the "Rented Equipment" rate of Section 27F.

Section 27D specifically references "site clearance" and "right of way clearance" of public works within its definition of "Construction". This was confirmed in the March 13, 2014 DLS Opinion Letter which states:

> "DLS has historically held that the wholesale removal of standing trees, including all associated trimming of branches and limbs, is "construction" within the meaning of c 149, s. 27D, and thus the classification of "Laborer: Tree Remover applies to this task." (March 13, 2014 DLS Opinion Letter, Page 1).

Section 27D does not restrict "site clearance" and "right of way clearance" to preliminary construction work. Rather, Section 27D only references the specific preliminary operations such as "*soil explorations, test borings and the demolition of structures*" which may qualify as construction as long as these operations are "*incidental*" to the core construction functions of "*site clearance*" and "*right of way clearance*". Accordingly, Section 24 D does not define "site clearance" or "right of way clearance" as "work done preliminary to the construction of public works". It only restricts the related listed "soil explorations, test borings and demolition of structures" in this "preliminary" category.

7 LABORERS' WAY
HOPKINTON, MA
01748
508-435-4164
FAX: 508-435-7982
www.masslaborers.org

Every Highway in the Commonwealth is an Ongoing Construction Project. The Union respectfully requests that the General Counsel take administrative notice of the fact that DOT continually awards contracts for the upgrading of the Commonwealth's Highway System. Each Highway consists of a roadway and a right-of-way. The roadway is generally centered within the established right-of-way owned and maintained by the Commonwealth. Just as the surface of the roadway is occasionally removed and re-graded for safe travel, trees growing in the surface of the Commonwealth's right of way, surrounding the roadway, must also occasionally be removed, and the right-of-way's surface re-graded, to assure safety of the Commonwealth's citizens and other travelers. The public safety mandate for tree removal is specifically outlined in the Scope of Work section of DOT Proposal No. 609027-106244 as follows:

> "The work under this contract will consist of removing, trimming, or shaping roadside growth: to eliminate trees and branches that are considered hazardous to the traveling public; to re-establish design sight distance; to re-establish safety recovery zones; and to clear overgrowth for sight visibility." (August 22, 2019 Request for Clarification, Page 1).

DOT's awarding of multi-year contracts for the removal of trees, and the re-establishment of safety recovery zones, cannot be realistically separated from the general category of ongoing Highway Construction. Some of the tree work contracted by the DOT may be in conjunction with simultaneous roadway construction. All of the remaining tree work will eventually support the next phase of roadway construction performed by DOT on that particular Highway as long as it exists. Even if a Highway is to be de-commissioned and dismantled, the associated tree work is still considered construction. The Union notes that there no identified time limit between the contracted tree work done as "site clearance" and "right of way clearance" and the next phase of DOT roadwork on a given highway.

Section 27F, covering the compensation of the operators of rental equipment, is not applicable to tree removal work performed with chainsaws, and other traditional equipment, by the Laborers of Northern Tree Service and other signatory contractors of the Laborers. The Supreme Judicial Court has advised us that we are to interpret our statutes and regulations according to traditional rules of construction. Mullally v Waste Management of Massachusetts 452 Mass. 526 (2008). In the Mullally case, the SJC specifically cited Warcewicz v. Department of Environmental Protection 410 Mass.548 (1991) as support of this proposition. (Mullally, Id). In the Warcewicz case, the SJC went on to clarify the limits statutory and regulatory construction by administrative bodies:

> "We interpret a regulation in the same manner as a statute, and according to traditional rules of construction. (Cite omitted). Thus, we accord the words of a regulation in their usual and ordinary meaning,. (Cites omitted). We ordinarily accord an agency's interpretation of its own regulation considerable deference. (Cite omitted). However, this principle is deference, not abdication, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself. (Cites omitted) (Emphasis added).

Section 27F is also a criminal statute mandating, pursuant to Section 27C(a)(1), a fine of not more than $25,000 or by imprisonment for not more than one year for a first offense. Reviewed as a criminal statute, the Courts will further provide additional scrutiny of the language to assure that it is specific and that it conforms to the traditional requirements of Due Process. While the language of Section 27F may cover contracted municipal street sweeping or trash removal, it clearly does not cover the traditional construction work of Laborers and Operators referenced in first line of Section 26. In fact, the specific Section 26 reference to "laborers in the construction of public works", and the statutory establishment of a prevailing rate for those laborers in Section 26, completely undermines the theory that these laborers should also be covered under Section 27F.

Finally, it was clear from the hearing that Steve Falcone, who has been solely performing the herculean task of reviewing these individual projects, should be provided with the immediate assistance of additional staff and the other resources he deems necessary to more thoroughly and consistently determine when the 27F wages for operators of rented equipment should apply instead on the Section 26 rate for laborers in the construction of public works.

Since I have not heard back from your office on my requested 72 hour extension, I shall end this letter at this point. Again, I appreciate the opportunity to provide your office with our concerns over this matter. And, I believe that the most realistic and appropriate action to take in this matter would be to maintain the March 13, 2014 Opinion Letter on Tree Work and apply the criminal provisions of Section 27F only in those limited instances where they clearly apply.

Sincerely,

Tom Coffey, Esq.
District Council Attorney

MASSACHUSETTS & NORTHERN NEW ENGLAND
LABORERS' DISTRICT COUNCIL OF THE
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

TOM COFFEY, ESQ.
District Council Attorney

7 Laborers' Way
Hopkinton, MA 01748

Telephone: (508) 435-4164
Fax: (508) 435-7982

RECEIVED

OCT 30 2019

DEPARTMENT OF LABOR STANDARDS
BOSTON, MA

OFFICE OF THE DISTRICT COUNCIL ATTORNEY
MASSACHUSETTS & NORTHERN NEW ENGLAND
LABORERS' DISTRICT COUNCIL
OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
7 LABORERS' WAY • HOPKINTON, MA 01748

UNITED STATES POSTAL SERVICE. Retail

P US POSTAGE PAID
$7.35
Origin: 02825
10/28/19
4333500825-04

PRIORITY MAIL 1-DAY ®

0 Lb 1.20 Oz
1004

EXPECTED DELIVERY DAY: 10/29/19

C021

SHIP TO:
19 STANIFORD ST
BOSTON MA 02114-2502

USPS TRACKING NUMBER

9505 5103 5992 9301 2081 09

John H. Ronan, Esq., General Counsel
Executive Office of Labor & Workforce
Department of Labor Standards
19 Staniford Street (2nd Floor)
Boston, MA 02114