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H. THOMAS CADELL, JR., *Chief Counsel*

201 + 202

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To Gary Herman	From DLSE -	
Co./Dept. DLSE-Redd.	Co. San Jose	
Phone #	Phone #	
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July 26, 1996

Paul K. Wilcox
Mullen & Henzell
112 East Victoria Street
P.O. Drawer 789
Santa Barbara, CA 93102-1501

Re: Employees Of Temporary Placement Agencies

Dear Mr. Wilcox:

The Labor Commissioner, Roberta Mendonca, has asked this office to respond to your letter of July 8, 1996, regarding the applicability of Labor Code §§ 201 and 202 to employees of a temporary placement service and an opinion regarding deductions from an employees paycheck as a result of the employee's dishonesty, willful misconduct or gross negligence.

The temporary placement service your firm represents provides employees[1] to various businesses who are in need of additional staffing. The temporary placement agency maintains the required personnel records and is reponsible for maintenance of the payroll, unemployment insurance, statate disability insurance, workers' compensation insurance[2] and other related human resource functions.

When one of the workers is assigned to render services at the premises of the client employer such an assignment may be as short as one day or as long as several months. These workers are paid by the placement agency once per week.

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[1]In your letter you refer to these workers as employees of the temporary placement service and fail to mention the workers' connection with the business clients for which they perform the services. Clearly, since the work is to be performed on the premises of the client business at the direction of the client business' staff, these workers are employees of the client business since the most important criteria in establishing employer-employee relationship is control. It is possible, of course, that there exists a joint-employer relationship with both the placement agency and the placement agency's employer client sharing the role.

[2]It is, of course, not necessary that both the placement agency and the client employer have workers' compensation insurance. (Labor Code § 3602(d))

As you point out, Labor Code § 201 provides, in relevant part, that "if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

You state that it is your understanding that "if the temporary service permanently terminates the employment relationship with one of its employees, meaning that that employee is taken off the temporary service's payroll and will not be sent on future assignments, the employee must be paid for all earned and unpaid wages immediately upon termination."

"On the other hand," you state, it is your understanding that "if an employee's assignment ends, but the employee has not been terminated by the temporary service, remains on the temporary service's payroll, and is available for future assignments, that employee has not been terminated and, hence, may be paid for hours worked in accordance with the temporary service's regular weekly payroll." In a related question, you state that it is your understanding that workers assigned by placement agencies who ask that they be withdrawn from a certain assignment prior to the natural expiration of that assignment (in other words, quit their current job) need not be paid within 72 hours in accordance with Labor Code § 202.

You ask that this Division confirm your understanding in this regard. We are sorry that we can not do so.

In your letter you provide no rationale or reason for exempting an employer from the provisions of Labor Code §§ 201 and 202 because the employer chooses to hire on a temporary basis. The fact that these workers are assigned by the temporary service does not change the nature of the employment relationship except, as pointed out above, it may provide a joint-employer relationship. You also provide no guidance regarding when an employee might know that the temporary service has decided not to send the worker on future assignments and, in your words, take the employee off its payroll. The temporary service which simply never recalled workers it no longer wished to employ could never be accused of having discharged any worker and the affected workers would be without recourse under your understanding of the law.

The Legislature has already chosen to exempt certain categories of workers from the provisions of Labor Code § 201[3] but has provided no exemption for temporary help situations.

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[3]Seasonal workers in the curing, canning or drying of a variety of perishable fruit, fish or vegetables (Labor Code § 201), certain workers employed in the motion picture industry (§ 201.5), and workers involved in oil well drilling (§ 201.7).

We suggest you may wish to approach the Legislature if you feel that any further exemptions from the provisions of Labor Code §§ 201 and 202 are appropriate. This Division, however, can not create the exemption you seek.

In an unrelated issue, you ask whether an employer may withhold from an employee's pay any losses caused by the employee's dishonesty, willful misconduct or gross negligence? In the situation you cite, the loss is that suffered by the client-employer.

The Industrial Welfare Commission Orders provide at Section 8:

> No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

While the Division will enforce the IWC Orders as written, it would be unfair not to point out that the California courts have taken a contrary position in regard to deductions from wages.

The case of *Barnhill v. Saunders* clearly holds that:

> "The policy underlying the state's wage exemption statutes is to insure that regardless of the debtor's improvidence, the debtor and his or her family will retain enough money to maintain a basic standard of living, so that the debtor may have a fair chance to remain a productive member of the community. Moreover, fundamental due process considerations underlie the prejudgment attachment exemption. Permitting [the employer] to reach [the employee's] wages by setoff would let [the employer] accomplish what neither it nor any other creditor could do by attachment and would defeat the legislative policy underlying that exemption. We conclude that an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (Emphasis added; citations omitted)

The *Barnhill* decision was decided subsequent to the promulgation of the 1980 Orders. Of course, the IWC did not change the language in either the Order or the Statement of Basis in the 1989 version of the Orders.

The case of *People v. Industrial Welfare Commission*, Santa Cruz Superior Court No. 85071[1], rested on the same principles which are applicable in this matter. There the court struck down the second sentence of Section 8 of the Orders based on the language in *Kerr Catering* which holds that the wages due belong to the employee, not the employer. The Supreme Court in *Kerr* went on to note that "It is doubtful that an employer with an unliquidated claim for damages against an employee would be permitted to withhold wages due the employee where such wages could not be reached by the employer as a judgment creditor." *Kerr Catering* (1962) 57 Cal.2d 319 at 325-326. The *Barnhill* court, relying on the law which came in the wake of *Sniddach v. Family Finance*, 395 U.S. 337 (1969), simply restated the *Kerr Catering* court notation in its 1962 decision which had held only that it was "doubtful" that such a withholding was allowed.

We hope this adequately addresses the issues you raised in your letter of July 8th.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Roberta Mendonca, State Labor Commissioner
Jose Millan, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Nance Steffen, Assistant Labor Commissioner

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[1]This case led to the amendment of the IWC Orders striking certain portions of Section 8 dealing with withholding.