

DEPARTMENT OF INDUSTRIAL RELATIONS

## DIVISION OF LABOR STANDARDS ENFORCEMENT

1986.12.24

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IN REPLY REFER TO:

December 24, 1986

Mr. Allen J. Perlof, General Counsel  
Security Pacific National Bank  
Head Office  
P.O. Box 2097  
Terminal Annex  
Los Angeles, CA 90051

Dear Mr. Perlof:

This letter is intended to respond to your letter of November 12, 1986, seeking clarification of the relationship between the Division's Interpretive Bulletin No. 86-3, applying the Suastez decision, and regulations issued under Internal Revenue Code Section 125 involving cafeteria-style benefit plans.

After receiving your letter, I asked my legal staff to do some legal research on this issue. We can find nothing in Internal Revenue Code Section 125 or any other provision of the Internal Revenue Code which would preempt California's Labor Code Section 227.3 and the Suastez decision. Moreover, under the California Constitution, Article III, Section 3.5(c), an administration agency is not permitted to refuse to enforce a California statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an Appellate Court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. Accordingly, a vacation plan which complies with the Internal Revenue Service regulation would not be a permissible exception to Suastez and the Interpretive Bulletin.

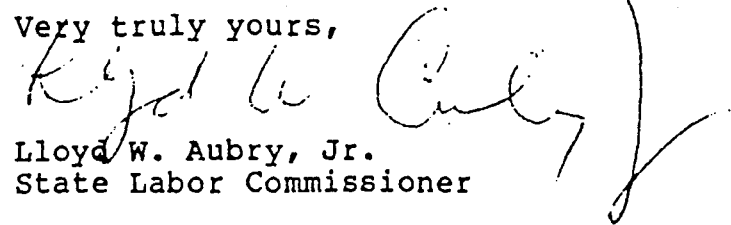
In order to comply with both the Revenue Code ruling and Suastez, the bank must insure that employees take all of their vacation before the end of the year or are paid off at the end of the year so that nothing is lost. Another option would be to remove vacation as one of the benefits offered in the plan and pay it separately. Finally, the bank could also structure its cafeteria-style benefit plan as a funded rather than an unfunded plan. As a funded plan, it would fall under ERISA and, therefore, be exempt from 227.3 and the Suastez ruling.

Mr. Allen J. Perlof  
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I apologize for the delay in responding to your letter and hope the foregoing will be useful to you as you redesign your plan.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lloyd W. Aubry, Jr.", written in dark ink. The signature is positioned to the right of the typed name and extends upwards and to the right.

Lloyd W. Aubry, Jr.  
State Labor Commissioner

LWA/cas