STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

March 8, 1993

Dawn T. Kitagawa
Ballard, Rosenberg & Golper
10 Universal City Plaza, 16th Floor
Universal City, CA 91608-1097

Re: **Request for Administrative Opinion**

Dear Ms. Kitagawa:

The Labor Commissioner, Victoria Bradshaw, has asked this office to respond to your letter of February 12, 1993, regarding issues involving Labor Code §§ 201 and 204.

According to your letter, your client, a national advertising company, employs "exempt outside salespersons" to perform the following services:

1. Sales to existing accounts;

2. Prospecting and generating new accounts;

3. Servicing accounts by assisting in advertising layouts, production, printing and delivery;

4. Developing client presentations and identifying marketing needs of accounts;

5. Developing marketing plans;

6. Ensuring collection of revenue from accounts;

7. Preparing orders and production support materials; and

8. Monitoring and reporting on competitive activity.

These account representatives are compensated on a commission basis and receive a draw which is calculated on the basis of 50% of the account representatives' prior year total commission earnings, not to exceed a maximum of $50,000 per year or a minimum of $18,200 per year. Newly-employed account representatives receive a draw based on their experience level which generally accounts for over 90% of the new account representative's total wages.

The commission rate is based on the final invoice amount for advertising sold. Thus, we assume, the "rate of commission" may change depending upon the amount of the invoice. However, you state that since "collection of revenue" from accounts is included in the account representatives duties, your client does not consider the commission earned until full payment for the advertising is received from the client. In the event payment is returned for insufficient funds or a refund is made to the client due to an error in the advertising, the account representatives' commissions are adjusted accordingly.

Commissions are calculated on a monthly basis and amounts in excess of the draw are paid on the 15th of the following month.

Upon termination, employees are considered by your client to have earned commissions if (1) the advertising runs within two weeks following termination; and (2) payment is received from the customer within 90 days of termination. No commission is paid on any account where the above conditions are not met.

Your first question involves the applicability of Section 204 of the Labor Code. Since that law requires that wages[1] earned in first fifteen days of the month be paid for no later than the 26th of that month and wages earned in the period from the 16th through the end of the month be paid no later than the tenth of the following month, you wonder if the payment schedule of your client meets the requirements of that section.

In support of your position that the payment schedule your client proposes should be approved by the Labor Commissioner, you attach a copy of a letter written in 1986 by then Labor Commissioner Lloyd Aubry which addresses what appears to be a question involving a loan officer's commission payment. It is not clear from the letter what the arrangement was except that Mr. Aubry felt that the fact that the fact situation presented might not even have been a violation of §204. Mr. Aubry felt that the isolated incident described by the writer of the letter might be a technical violation but that the spirit of the law had been satisfied. Since we do not know what the original letter stated, we would find it very difficult to comment on the reply.

You ask if the Labor Commissioner will approve the plan your client proposes because, while the client wishes to conform to California law, "it would be an extreme burden" to do so. Also, the client finds that meeting the requirements of Labor Code §203 would be impossible for similar reasons.

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[1] Wages, of course, include "commissions". See Labor Code §200.

Labor Code Section 204 does not provide a test as to when commission wages are calculated. Section 204.1 does provide that commission wages for automobile salespersons are due once a month, but the commissions of other salespersons are left to the conditions of the contract of employment. Thus, if your client provides a commission schedule which calls for the commissions to be calculated once a month or less often[2], the provisions of Labor Code §204 would not void that provision.

As you know, outside salespersons are exempt from the Industrial Welfare Commission wage orders and, thus, unlike an automobile salesperson, an outside salesperson is not required to be paid any statutory amount. However, if the employer promises a fixed draw, that draw (which is a wage) must be paid twice a month.

On the other hand, Labor Code §§ 201 and 202 clearly provide that all wages are either (1) due at time of termination in the event of discharge or (2) due within 72 hours in the event of a voluntary quit. The fact that the employer might find it difficult to compute the commissions owed would not alleviate the obligation to pay the wages as provided in the statutes. It would be only those commissions which were "earned" which would be subject to the provisions of §§ 201 and 202. That is, those commissions for which all of the legal conditions precedent had been met.

This office will not attempt to give an opinion regarding whether the conditions precedent your client places on the "earning" of the commission would be valid. As you know, the Labor Code does not specifically address many of the contract terms found in employment. The common law theories of contract law are applied by the courts. You are, of course, aware of the fact that most employment contracts are contracts of adhesion and most strictly construed against the employer. Additionally, the common law doctrines of "prevention" and "impossibility of performance" would, of course, be argued in any case where your client's proposed plan were in issue.

The California courts have long held that the salesman is entitled to his commission. Your attention is directed to the 1949 case of *Willison v. Turner Resilient Floors*, 89 Cal.App.2d 589 (1949) which stands for the proposition that "he who shakes the tree is the one to gather the fruit." A salesman is not normally a debt collector. However, it is recognized that in the area of advertising, it is common practice for the employer to take added precautions because there exists the danger of fraud upon the employer.

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[2] There are some sales positions dealing with large ticket sales wherein the accounting against the draw is done once a year.

Whether a court would allow an employer to divest an employee of his or her earned commissions simply because the client pays on the ninety-first day; or there is an error in the advertisement for which the salesperson cannot reasonably be held accountable is questionable.

At any rate, this office will give you no opinion on law which is always open to interpretation. These types of cases are fact driven and do not lend themselves to black and white answers. Since the interpretation of the common law is obviously within the sole discretion of the courts, a general opinion by this office would be of no importance.

I hope this adequately addresses the issues raised in your letter of February 12, 1993.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw