

DEPARTMENT OF INDUSTRIAL RELATIONS

## DIVISION OF LABOR STANDARDS ENFORCEMENT

525 GOLDEN GATE AVENUE  
SAN FRANCISCO, CALIFORNIA 94101

(415) 557-3827

ADDRESS REPLY TO:

P.O. BOX 603  
San Francisco, CA 94101

November 17, 1986

IN REPLY REFER TO:

Mr. Vic Biondi  
Executive Director  
California Broadcasters Association  
1127 - 11th Street, Suite 720  
Sacramento, CA 95814

Dear Mr. Biondi:

Thank you for your letter of October 21, 1986, regarding payment of vacation pay to employees on a draw plus commissions under the recent Suastez decision.

The Labor Code and the Suastez decision permit employers to establish the amount of vacation and control the time when vacation may be taken. In determining the amount of vacation in the context of a commissioned employee, the employer may limit the vacation pay to the amount of the draw, or various combinations of draw plus percentages of commissions.

In most instances, when a salesperson is on a draw plus commission, that person receives the draw during the vacation period and any previously earned commissions that become due during the vacation period. This arrangement may lead to a dip in the earnings a few weeks later as the salesperson does not generate any new commissions during the vacation period. Salespersons usually realize that when they are on vacation, they cannot service their accounts and must rely on backup assistance or repeat orders during their vacation.

It is very rare that an employer would average out commissions for the period prior to the vacation and pay this amount during the vacation period. However, as the Suastez decision permits employers to set the amount of vacation, there could be numerous combinations of draws and commissions available as a basis for setting a vacation policy.

To answer your specific question regarding how the Division would compute pro rata vacation, the Division would look to the basic vacation policy or agreement and require the employer to pro-rate on that basis. For example, if the policy is to pay

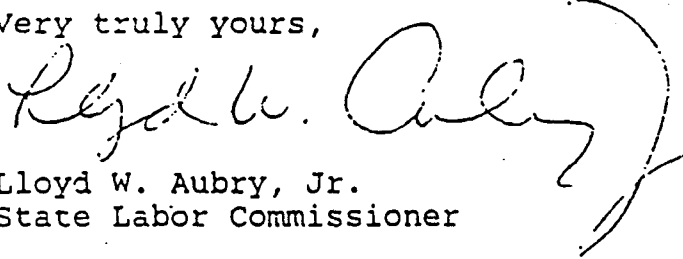
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only a draw during the vacation period, the pro rata share of the draw would be required to be paid. It should be noted that the employee, under the basic wage laws, would be entitled to any commissions that become due and payable during the vacation period regardless of the Suastez decision and/or the employer's vacation policy.

I would suggest that you advise the employers to review their vacation policies covering salespersons to make sure that in cases of a termination that the agreement is specific as to how the amount of vacation is computed (consistent, of course, with the principles of Suastez). If terminated, the employee will be entitled to a pro rata share of that amount.

I hope this answers your questions. If not, please let me know.

Very truly yours,



Lloyd W. Aubry, Jr.  
State Labor Commissioner

LWA:ba

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