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*

January 19, 1993

Deborah R. Fleischer, Esq.
Powell, Goldstein, Frazer & Murphy
191 Peachtree Street, N.E.
Sixteenth Floor
Atlanta, GA 30303

Re: **Bonuses To Terminated Employees**

Dear Ms. Fleischer:

This will acknowledge receipt of your letter of December 10, 1992, attaching your letter of October 15, 1992, regarding the above topic.

Your letter indicates that your client has contracted to pay an incentive bonus if the company meets and exceeds certain corporate profit objectives in a given fiscal year. You state that this is generally a non-discretionary bonus since the award will be paid out if the company meets its goals and the calculations for determining the amount of the award are specifically spelled out in the contract. You then state that "[h]owever, since the award is based on group productivity, management reserves the right to reduce or eliminate the amount of the bonus when management determines the employee's individual performance does not meet company requirements."

You then go on to say that if the company meets its goals, a bonus, calculated as a percentage of profits according to a formula set out in the contract, will be paid to employees as follows: If the incentive award is less than $20,000, the total award will be paid as soon as practical after the end of the fiscal year. If the amount is greater than $20,000, the greater of one-half (½) of the award or $20,000 will be paid as soon as practical after the end of the fiscal year and the remainder will be paid January 1 of the following fiscal year. In order to receive any award under the plan, participants must be employed on the date of each respective payment. The purpose of structuring a bonus payout in this manner, according to your letter, is to provide an incentive for employees to remain in employment after the close of the fiscal year in which the bonus is based.

You state that you have spoken to "several Assistant Labor Commissioners as well as an attorney in your department and have received several different answers to my question.[1]" I have no doubt you did get a variety of answers.

You state that you are in receipt of that portion of the DLSE Policy and Procedure Manual which addresses the issue of bonuses. In that document, there is a detailed discussion of the difference between discretionary and non-discretionary bonuses. The bonus you describe falls somewhere in between.

Employment bonuses in California are not expressly covered by the California Labor Code. As you were told, the right to the bonus is based upon the contract between the parties. The determination as to whether the bonus would be due or not is made under common law principles as modified by California statutory law. As you will have noticed in the material from the DLSE Manual which you received, there are two California appellate court cases which deal specifically with the question of employment bonuses. In both cases[2] the court applied common law contract doctrines, California statutory law which modifies some of the harsher results of common law, and equitable principles.

While the case of *Lucien v. All States Trucking* (1979) 116 Cal.App.3d 975, cites the general rule that an employee must remain in the employ of the employer for the entire earning period, it does not address the question you raise as to what happens when the bonus requires that the worker continue to work past the earning period for some other specified period of time.

As the facts in *Lucien* disclose, the declaration of John J. O'Kelly, a senior vice president of Pacific Intermountain, stated that in the past, each plan had been consistently interpreted and applied to preclude vesting of any benefits unless the participant completed the current calendar year in the service of his employer. Each plan clearly stated that the bonus was based on profits, was not determined or payable until the end of a fixed period, and that an employee who voluntarily left his employment was not entitled to a pro-rata share of his benefits.

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[1] The question posed was: When an employer conditions payment of a bonus on an employee remaining in employment up to a date six (6) months after the close of the fiscal year in which the bonus is based, is an employee divested of any claim to this bonus if he voluntarily terminates employment after the close of the fiscal year but prior to this date? Does the answer vary if an employee is a management employee?

[2] *Lucien v. All States Trucking* (1979) 116 Cal.App.3d 975; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1971) 88 Cal.App.3d 823.

> "Thus, an employee who voluntarily leaves his employment before the bonus calculation date is not entitled to receive it. This has been the rule ever since this court (Division Two) so held in *Peterson v. California Shipbuilding Corp.*, 80 Cal.App.2d 827, 831, 183 P.2d 56. Our rule is in accord with the prevailing view that where a definite bonus or profit-sharing plan has been established and forms part of the employment contract, the employee is not entitled to share in the proceeds where he leaves the employment voluntarily..." *Lucien, supra,* 116 Cal.App.3d at 976.

The California courts look upon an offer of a bonus as binding unilateral contract in that when the employee begins performance the plan then cannot be revoked by the employer.

The plan you propose (leaving aside for the moment the question of whether it is a discretionary or non-discretionary bonus) allows the employee to recover up to $20,000 as soon as practical after the end of the fiscal year upon which the bonus is calculated. However, the plan requires that the employee remain in the employ of the employer until January 1st of the following fiscal year in order to recover any bonus amount in excess of $20,000. You state that the purpose of structuring a bonus payout in this manner is to provide an incentive for employees to remain in employment after the close of the fiscal year[3] in which the bonus is based. Why, then, does such structuring take place only when the amount of the bonus exceeds $20,000?

As I pointed out, above, the California courts have used principles of equity in bonus cases. I am sure that an argument can be fashioned which would convince a court that making an employee wait for an ascertainable bonus simply because the amount of the bonus exceeded a given figure would be inequitable under certain circumstances.

The Deputy Labor Commissioners and the attorney you spoke with may each have been right. There is no black and white answer when one is attempting to give advice where equitable principles may be employed. For instance, the individual who told you that bonuses are considered wages is also correct. (See *Lucien, supra*) As a general rule wages must be paid when earned.

Each case involving a bonus must be judged on its own facts. The Division of Labor Standards Enforcement has been doing just that for many years. Sometimes the courts agree with the decision made by our hearing officer, sometimes they do not. Any "official opinion" by this Division would be entitled to little or no weight in the courts. The question of the interpretation of bonus con-

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[3] The facts you submit do not reveal when the fiscal year ends.

tracts is not one of the areas which the Legislature has given the Division authority to set standards. The Division personnel simply attempt to apply California law.

As your letter evidences, there are always factual differences in each case. For instance, I still haven't been able to figure out if the plan you propose is a discretionary or non-discretionary bonus. I guess that determination would simply have to rely on the facts.

As to your question of whether the answer would vary depending on whether the employee was a management employee, I can only tell you that there is a possibility that the answer may be different. Notice of the terms of the contract, of course, is very important. Thus, the management employee who has access to the company policy manual will obviously be considered to be in a better position to understand the bonus policy than a mono-lingual, Spanish-speaking parts installer.

I hope this adequately addresses the issues you raised in your letter of October 15, 1992.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw