STATE OF CALIFORNIA PETE WILSON, Governor

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

October 1, 1997

Jeffrey A. Berman
Proskauer Rose LLP
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206

Re: **Effect of Barner v. City of Novato On DLSE Enforcement Policy**

Dear Mr. Berman:

In your September 22, 1997, letter, you ask this agency to express an opinion as to whether the Division would follow the ruling issued by the Wage and Hour Administrator and the Ninth Circuit's decision in *Barner v. City of Novato,* 17 F.3d 1256.

The Barner case involved the issue of "whether the words 'amount' and 'compensation' in the [DOL] regulation refer to cash or to all forms of compensation?" *Id.*, at 1261. The Ninth Circuit panel in that case determined that the term "amount" refers to "cash" or "salary". *Id.* at 1261. The court, therefore, viewed vacation pay as something other than "salary" or "cash", though they did not describe what that other category was.

Labor Code § 200 defines wages to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." This all-inclusive definition of "wages" would include, of course, wages paid in the form of "salary".

In the leading case on the subject of vacation wages in California *Suastez v. Plastic Dress-Up* (1982) 31 Cal.3d 774; 647 P.2d 122; 183 Cal.Rptr. 846, the court held that "vacation pay is ... additional wages for services performed. [Citations.]" > (Id. at p. 779, 183 Cal.Rptr. 846, 647 P.2d 122; see Labor Code, § 200, subd. (a).) "Only the time of receiving these 'wages' is postponed." (*Suastez, supra,* at p. 779, 183 Cal.Rptr. 846, 647 P.2d 122.) "The right to a paid vacation, ... constitutes deferred wages

for services rendered." (*Id.* at p. 784, 183 Cal.Rptr. 846) "The consideration for an annual vacation is the employee's year-long labor." (*Id.* at p. 779, 183 Cal.Rptr. 846) "The employee has earned some vacation rights 'as soon as he has performed substantial services for his employer.' [Citations]" (*Id.* at p. 780-781, 183 Cal.Rptr. 846) Thus, "when the services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or other form of compensation." (*Id.* at p. 781, 183 Cal.Rptr. 846)

At common law there is a presumption that an employee volunteers extra services performed within the scope of his employment or that his salary is intended to compensate him also for the extra work. (*Sieck v. Hall* (1934) 139 Cal.App. 279, 295, 34 P.2d 844.) Accordingly, at common law, where an employee rendering extra services receives a regular salary and such services are similar to his regular duties, the employer has no obligation to pay him for the additional services absent an express contract to that effect. (*McCoy v. West* (1977) 70 Cal.App.3d 295, 304, 138 Cal.Rptr. 660; 29 Cal.Jur.3d Rev., EMPLOYER AND EMPLOYEE, § 42, pp. 598-599.)

The salary-exempt employee is not subject to the statutory requirement and the common law concept of salaried employee is what he or she works under. The conclusion that an exempt executive's pay may not vary as a function of the number of hours worked is also consistent with a common-sense understanding of salaried employment. Certainly a layman would understand that a salaried executive is a person paid an amount, on a weekly or less frequent basis, that bears no relationship to the number of hours worked in any particular week. The Ninth Circuit put this point as follows:

> "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the ... quantity of work performed"....*Abshire v. County of Kern*, 908 F.2d at 486.

Similar conclusions have been reached in the Third Circuit in *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184 (3d Cir.1988), cert. denied *sub nom. Claridge Hotel & Casino v. McLaughlin*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988).

The Ninth Circuit in *Barner* has concluded, pursuant, we assume, to federal common law concepts, that vacation is not salary

but is some other undefined form of compensation. However, the conclusion reached by the *Barner* court is, at the very least, inconsistent with California law as I have described it above. California law holds that vacation pay is vested wages and only the time for recovery of such wages is deferred.

While the above rationale addresses the use of vacation pay to offset salary wages owed, there may be other types of compensation which are not subject to statutory restrictions such as Labor Code § 227.3. This letter does not address those instances because your letter refers to "paid leave bank" or "accrued vacation" which, as you may know, are synonymous terms.

To the extent that federal regulations or case law are inconsistent with California law, the Division will not, of course, adopt such federal law.

I hope this adequately addresses the issue you raised in your most recent letter to this office seeking an opinion. I appreciate the fact that you do realize that this office is extremely busy. As you know, the Division Legal staff has a heavy caseload and, as with the United States Department of Labor, a considerable[1] delay may ensue between receipt of requests for opinions and delivery of those opinions.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Jose Millan, State Labor Commissioner
Nance Steffen, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
Tom Grogan, Assistant Labor Commissioner

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[1]I am informed that six- to eight-month delays are not uncommon when requesting first-impression opinions from the Secretary of Labor.