STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

September 18, 1998

Daniel R. Kopti, Esq.
Georgia Pacific Corporation
Law Department
133 Peachtree Street NE
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Atlanta, Georgia 30348-5605

RE: Negative Election to Participate in 401(k)plans--
Labor Code Sections 221-224

Dear Mr. Kopti:

This is in response to your letter of June 9, 1998, requesting an opinion as to whether a "negative election" to participate in your company's 401(k) plan violates California Labor Code Section 221, or falls within the exemption therefrom found at Section 224. Your letter states that your company sponsors several 410(k) plans for its employees, and currently utilizes a positive election procedure, whereby an employee eligible to participate in the plan(s) contacts the claims processor and authorizes deductions to be made from the employee's wages. The deductions are invested in accord with several choices given the employee, and are currently matched by employer contributions to the plan(s), up to 6% of the employee's base pay. Your letter does not state whether the authorization currently required is written. If the employee does not authorize the deductions, no matching contributions are made by the employer.

Under the proposed procedure, the employees eligible to participate in the plan(s) would be automatically enrolled in such plans unless they affirmatively elected not to participate in the plan, and so notified the plan administrator(s). The employees would be notified upon employment and/or eligibility concerning the negative election procedure. Although, your letter does not so state, the Revenue Ruling you included therewith, Rev. Ruling 98-30, appears to condition IRS eligibility on giving the employee notice that he or she has the right at any time to discontinue contributions and to change the amount of contributions. Employee contributions to the plan are non-forfeitable, and not subject to vesting requirements. The Revenue Ruling states that employees must have the option of receiving cash or other taxable benefits in lieu of participation in the deferral of income through plan investment. The Revenue Ruling does not address state law minimum

standards requiring written authorizations for deductions.

California Labor Code Section 221 prohibits employers from collecting or receiving any part of an employee's wages. Exceptions to Section 221 are found in Section 224. Allowable deductions from wages, pursuant to Section 224, are limited to those required by state or federal law (e.g. income tax withholding, FICA and the like), and deductions "expressly authorized in writing by the employee" (or the employee's collective bargaining representative), such as deductions for health, vision, dental insurance premiums, pension plan contributions, and other employee deductions "not amounting to a rebate," authorized by the employee in writing.

Historically, DLSE has taken the position that any such deductions had to be authorized by the employee in writing. Bowing to the advances made by technology, the agency has interpreted Section 224 as allowing emloyees to authorize deductions by computer through the use of electronic personal identification numbers (PIN), where the employer takes reasonable precautions consistent with industry standards to protect both the integrity of the system and the privacy of the employee. This method, however, unlike the proposal which is the subject of your request, still requires that the employee exhibit an affirmative election to allow the deduction before the deduction is made. Nothing within the current confines of the statutory scheme allows for non-governmental deductions not authorized in advance by the employee, regardless of whether the employee has the capacity to cancel the deduction.

Accordingly, it is the view of DLSE that the proposed procedure outlined in your letter violates California Labor Code Section 221, and does not fall within the exceptions provided by Section 224. Thank you for your interest in California labor statutes. Please contact the undersigned if you have any questions regarding this matter.

Very truly yours,

Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen