STATE OF CALIFORNIA

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IN REPLY REFER TO

July 13, 1987

Ms. Chris Quackenbush, President
Q Tech
4701 Patrick Henry Drive, Bldg. 1
Santa Clara, CA 95054

Dear Ms. Quackenbush:

This letter is in reply to your letter of May 29, 1987, concerning the application of state labor laws on vacation pay to temporary service agencies. Particularly, your letter questioned the practice of such agencies providing bonuses in lieu of vacation in the context of the California Supreme Court's recent Suastez decision. I apologize for the delay in responding to your letter, but the issues that you have raised are very complex legally as well as practically.

As noted above, the question you have posed is difficult. In the normal employment situation, a person is employed throughout the year and, therefore, an employer's policy of providing time off with pay or vacation is necessary for the employee to have any time off from the job. On the other hand, in a temporary services agency, if employment is intermittent there is no reason for the employer to provide any vacation time because, by the very nature of the employment situation, there will be periods when the employee will not be employed and will be, in effect, on vacation. Moreover, it is not unreasonable for a temporary service agency to provide a bonus to people who are continually available for intermittent employment. Indeed, providing a bonus is a way of insuring that the temporary service agency will always have a qualified pool of employees to supply to clients for temporary jobs.

Obviously, in the temporary service agency situation, there is a tension between a vacation plan and a bonus plan which cannot be easily resolved. Payment of bonuses for longevity of service has been an acceptable practice under the Federal Fair Labor Standards Act since it was enacted in the late 1930's. The Federal government has never had to resolve the problem that you raise because federal law does not require proration of vacation benefits.

Frankly, I do not believe that I have the authority to outlaw longevity bonuses in the temporary services industry. On the other hand, if an employer has a policy of working its employees 52 weeks a year and granting longevity bonuses after 50 weeks and then granting the employees leave without pay, that would clearly be a subterfuge to avoid Suastez and would require proration of benefits. Moreover, the employers that you have listed in your letter which do provide vacation benefits but do not prorate them may well be in violation of the Suastez decision and we are reviewing their policies.

I appreciate your bringing this matter to my attention and I hope you understand that it is a very difficult area to resolve and one that cannot be resolved by a broad rule. Rather, each case must be examined on its own facts to see if a subterfuge has been created to avoid day-by-day vesting under Suastez or a legitimate longevity bonus is being paid.

Very truly yours,

Lloyd W. Aubry, Jr.
State Labor Commissioner

LWA/cs

cc: Simon Reyes, Assistant Labor Commissioner

bcc: Regional Managers
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