STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Gov.

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
525 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

1988.05.04

Legal Section

ADDRESS REPLY TO
P.O. BOX 603
San Francisco, CA 94102

May 4, 1988

IN REPLY REFER TO

Kevin A. Marino, Esq.
Jackson, Lewis, Schnitzler & Krupman
1925 Century Park East, 11th Floor
Los Angeles, CA 90067

Re: Payment of Commission Wages

Dear Mr. Marino:

The Labor Commissioner has asked me to respond to your letter of March 28, 1988, requesting an administrative opinion regarding the legality of your client's practice of delaying payment of commissions to its employees following termination.

I note, initially, that you point out that your client guarantees one and one-half times minimum wage to the "commissioned" employees who are paid "on a straight commission basis". I gather from this statement that your client is taking advantage of the provisions of subd. 3(C) of either Order 4-80 or 7-80 which exempts employees whose wages are primarily commissions from the overtime provisions of the IWC Orders if they are paid at least time and one-half the minimum wage. If my assumption is correct, I must advise you that employees providing repair services are not commissioned employees (Keyes Motors v. DLSE (1988) 197 Cal.App.3d 557) but are being paid on what appears to be a piece rate, and, consequently, are not subject to the overtime exemption.

To address your direct question, a procedure which would delay payment of earned wages would violate the provisions of Labor Code §§ 201 and 202 which provide that wages of employees who are discharged must be paid at time of termination and wages of employees who voluntarily quit must be paid within seventy-two hours unless seventy-two hours prior notice of intention to quit has been given.

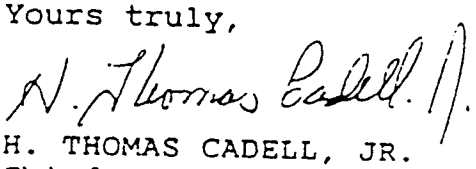
As pointed out above, the employees you describe in your letter are not working on a commissioned basis but are working on a piece rate schedule. Your letter states that your client pays the "commissions" upon receipt of payment from the customer, subject to subsequent offsets/reimbursements for recalls pursuant to the company's recall policy. The sum which your client withholds from the final wages would appear to be de-

signed to cover "offsets". The case of Barnhill v. Saunders (1982) 125 Cal.App.3d 1, teaches that an employer may not offset any damages from an employee's wages even if the amount is liquidated. (See also, California State Employee's Assn. v. State of California (1988) 198 Cal.App.3d 374; Review denied April 21, 1988)

I hope this adequately addresses the questions you raised in your letter. I would again caution that in the event your client is considering these employees as exempt from the overtime provisions of the IWC Order, that he reevaluate that position in light of the Keyes Motors case.

If you have any questions, please feel free to contact the undersigned.

Yours truly,



H. THOMAS CADELL, JR.
Chief counsel

c.c. Lloyd W. Aubry, Jr.
James Curry
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