

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENTLegal Section
30 Van Ness Avenue, Suite 4400
San Francisco, CA 94102

October 1, 1990

Gregory D. Wolflick
130 North Brand Blvd.
Ste. 410
Glendale, CA 91203

Re: Legal Opinion

Dear Mr. Wolflick:

Your letter of September 18, 1990, addressed to Acting Labor Commissioner James H. Curry has been assigned to this office for response.

In your letter you outline a commission plan whereby the sale representative's commission is determined by the percentage of the gross profit margin for the various items sold and that commission is reduced by losses as a result of uncollectible accounts and "slow paying accounts" experienced by the company which are attributable to the sales generated by the sales representative. The plan you outline provides for a "reserve account" which, you point out, is funded entirely by monies from the employer. You do not, however, explain how much is in the "reserve account" or how the amount is calculated.

As I understand the plan, if a sales representative makes a sale and the customer does not pay the amount owed within sixty-one days, the employee forfeits one-third of his or her commission. In the event the customer fails to pay the account within ninety-one days, the full commission is forfeited by the salesperson.

In addition, and quite apart from the above, you seem to have a provision which provides that in the event the sale results in a "bad debt" (uncollectible account^{1/}), 20% of the total amount of the uncollectible debt (over and above the amount available in the "reserve account") is taken out of the employee's future commissions (unrelated to the commissions due on the particular sale which resulted in the "bad debt").

1/ Your letter does not state what criteria your client uses to conclude that the account is "uncollectible".

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Initially, allow me to address the "uncollectible accounts" deduction. Clearly, the employee has no control over whether the customer pays for the goods or not. "Bad debts" are an acknowledged cost of doing business. The employer may not make the employee the insurer of his business losses. (Kerr Catering v. DIR (1962) 57 Cal.2d 319; Quillian v. Lion Oil (1979) 96 Cal.App.3d 156) Any deduction, direct or indirect, from the salesperson's commissions to pay for "uncollectible debts" would be illegal.

Next we must address the question of the deductions for the so-called "slow paying" accounts. In your letter you simply set out a test which is applied by the employer to determine when to "forfeit" substantial amounts from the salesperson's commissions. When the account is not paid within sixty-one days the employee forfeits one-third of the commissions he or she has been paid for making the sale. When the account is not paid in ninety-one days, the remaining two-thirds of the commission is "forfeited". Your letter fails to disclose why this does not result in unjust enrichment for the employer. There appears to be no reason for the "forfeiture" except that the customer is late in paying. What happens, for instance, if the account is paid on the ninety-second day? For that matter, what happens when the failure to pay for the goods is the result of a mistake made by the employer?

Depending on the type of business and the goods sold, commission plans vary. Under very limited circumstances it may be possible to have the employee's commission taxed to pay the prorata share of collection activities undertaken by the employer. It is also possible to have a commission plan that does not pay the commission until the money is received by the employer. The argument could be made that the plan you outline simply turns that commission plan around. However, that is not quite so. The plan you outline results in a complete forfeiture of the commission even if the employer eventually receives the money.

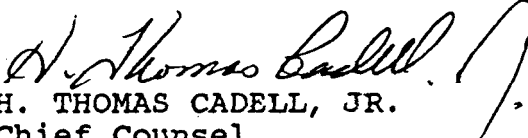
I can point to no caselaw which is directly on point regarding the "slow paying accounts" deductions. However, I believe that I could recover the unpaid commissions in an action at law based upon the doctrine of unjust enrichment. There may be other circumstances which I am not aware of which would color that opinion, but based upon the facts I have before me, that would be my opinion.

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I hope this adequately answers the questions you raised in your letter. If you have any further information or comments please feel free to contact the undersigned.

Yours truly,


H. THOMAS CADELL, JR.
Chief Counsel

c.c. James H. Curry

1990.10.01