STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
30 Van Ness Avenue, Ste. 4400
San Francisco, CA 94102

H. THOMAS CADELL, *Chief Counsel*

February 25, 1991

Re: Application of Statute of Limitations To Vacation Benefits Under Labor Code §227.3

The Acting Labor Commissioner, James H. Curry, has asked me to respond to your letter of February 6, 1991, regarding the above-referenced subject matter.

I realize that your letter declared the urgency of the situation your banking clients were facing, but your question involved a review of the Division's policy. The agency's concern, of course, is that both the employer community and employees may rely on the enforcement policy promulgated by the State Labor Commissioner. Finality and consistency are important aspects to be considered in this regard.

On the other hand, the courts are, in the last analysis, the final judge of the meaning of the statute. The agency must, then, insure that its interpretation meets the criteria which the courts will utilize.

The provisions of Labor Code §227.3 provide:

> Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. <u>The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.</u> (Emphasis added)

1991.02.25

In your letter of February 6th, you cite to the Labor Commissioner's Interpretive Bulletin 87-7, which states that for enforcement purposes, the Division of Labor Standards Enforcement will apply the statute of limitations twice: once at the outset of the review of the claim to limit the time within which the claim may be brought after termination, and again to limit the time — measured from the date of termination backward — the liability of the employer exists. Both applications of the statute of limitations are to be based on whether the vacation contract (or policy) involved was written or oral. (e.g., two years or fours years.)

The Interpretive Bulletin notes that the Labor Commissioner, pursuant to the dictates of the statute, is to apply the principles of equity and fairness in enforcing the statute. While it may be argued that the words "equity" and "fairness" are ambiguous terms in this context, the Legislature must have intended that the phrase have some meaning. Since it is the Labor Commissioner to whom the mandate is given, it must be that the Legislature intended that the Labor Commissioner's view was to be given great weight. If, then, the Labor Commissioner's view is not clearly arbitrary or capricious, that view should be adopted by the courts.

It is necessary, therefore, that we look at the rationalé the Labor Commissioner used to establish this enforcement policy.

It should be noted at this point that vacations policies are not designed to simply give the worker additional wages. Vacations inure to the benefit of both the worker and the employer. The employer expects that the added benefit will result in the employee taking the time off and returning rested and prepared for work. The employee, of course, enjoys the benefit of the free time.

The Interpretive Bulletin states that "the statute of limitations begins to run as the vacation is earned or at the point when the employee is eligible to take the vacation." In other words, if the vacation policy provided that the employee earns one-half day of vacation credit for each month of employment without any further condition, the prorated vacation benefit would be subject to the statute of limitation as the vacation benefit is vested[1] because,

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[1] The vacation is accruing, of course, on a daily basis, but for practical purposes, the employee could not take any vacation until at least one day is vested. Absent any condition which would preclude the worker from taking the vacation as it accrues, under the DLSE policy the statute of limitations would begin to run on the accrual of one day of vacation.

(continued...)

without any further limitation, the employee would be entitled to take the vacation at that time.

In your letter you seem to draw a distinction between "vacation pay" and "wages", and this may explain your concern with the rationalé employed by the Labor Commissioner. As the Supreme Court said in *Suastez*, vacation benefits are simply deferred wages. In the opinion of the Labor Commissioner, claims for recovery of those "wages" are subject to all of the same liabilities and defenses any other wage claims enjoy.

As an analogy, the Interpretive Bulletin quite correctly points to a claim of wages which the worker contends remains unpaid.[2] The Bulletin uses an example of an employer who refuses to pay certain claimed wages. As the Bulletin points out, the wage claim is subject to the defense of the statute of limitations. Since there appears to be no reason that vacation wages are to be treated different from any other wages, it is only reasonable, concludes the Bulletin, that the same application of the statute of limitations should be used. Since the right to the vacation under the employment contract or policy (and thus, the recovery of the vacation wages) was available to the worker, the worker's failure to take that vacation time should not result in added wages without the return of the *quid quo pro* to the employer of a rested worker.

However, as the Bulletin points out, if the employer policy has any rule which is inconsistent with *Suastez*, or if the employer precludes the employee from taking vacation within the applicable statute of limitations, the statute is tolled as to recovery of those wages.

You ask in your letter about the waiver of those vacation benefits which might be vested. We will put aside for the moment the discussion regarding the statute of limitations and assume that the statute does not apply.

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[1](...continued)

[2] For purposes of illustration, assume that en employee is hired at the rate of $10.20 per hour under the terms of a written agreement. Through an error, the employee recieves only $10.00 per hour for the first ten hours he is employed by the company. The employee discovers the error three years later. Under these circumstances the employee's action to recover the unpaid wages would be subject to the defense of the statute of limitations.

It remains the considered opinion of the Labor Commissioner that Labor Code §206.5 clearly precludes an employer from requiring a release of any wages earned unless payment of the wages has already been made. Earned vacation wages would be no exception to this rule. Voluntary waivers under section 206.5 may, of course, be subject to review to determine the facts surrounding the alleged waiver. An action euphemistically referred to as "voluntary" that is actually the result of an indirect threat to one's job security, will not meet the requirements of section 206.5. Additionally, as you point out, there would have to be some consideration for the waiver to be valid under established contract law principles.

I hope this adequately explains the Division's enforcement policy as reflected in the language of Interpretive Bulletin 87-7.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James H. Curry