STATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
Golden Gate Avenue, Room 3166
Francisco, CA 94102
(415) 703-4150

H. THOMAS CADELL, JR., *Chief Counsel*

February 16, 1993

Ralph L. Hawkins, Esq.
Davis, Wright, Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

Re: **PayLess Drug Stores Norhtwest, Inc.**

Dear Mr. Hawkins:

This will acknowledge receipt of your letter of February 3, 1993, wherein you suggest that I made the following statement:

> "...the PayLess Drugstores vacation policy which contains a ceiling on vacation accrual would not be permissible under California law in that is would result in a forfeiture of earned wages."

In the first place, I have never had the opportunity, so far as my records indicate, of speaking with you. Additionally, I never made the statement you attribute to me in any phone conversation.

Frankly, I am called upon to answer questions regarding vacation pay plans on a regular basis. I do remember speaking with Deborah Granfield, an attorney from Southern California regarding the matter of a vacation plan which provided that the employee had to take the vacation within the same one-year period of time that the vacation was earned or be capped with the amount of vacation which was earned within that one-year period. I also remember that there was an out-of-state law firm involved in the matter. If this is the same situation, I will tell you that I am satisfied with the opinion I gave at that time: Such a plan will not be accepted by the California Labor Commissioner.

You state in your letter that:

> "Under the PayLess policy, vacation is earned on a prorata basis day by day throughout the year. Thus, if the employee's maximum vacation which may be accrued for

> the year is two weeks, a week of that vacation will be accrued by mid-year and all of it will be accrued by the end of the year."

That seems pretty evident to me. But then you go on to say that the "provisions of the PayLess policy permit an employee to take a paid vacation which has not been earned." Based upon this "fact" you conclude that there is a reasonable time within which to take the vacation. But you do not say what the "reasonable time" is.

If, as I say, this is the plan I discussed in a phone conversation with Deborah Granfield, an attorney from Southern California, it is my understanding that the one week of vacation accrued during the year of employment <u>must</u> be taken during <u>that</u> year. Failure to take the vacation during that year will result in no further vacation accruing until vacation is taken. Further, you fail to mention that under your PayLess policy, if the worker takes the week off during the year and then, for any reason does not complete the year, the employer will withhold the unaccrued vacation taken from the employee's final pay.

As you may know, the statute in question provides that the Labor Commissioner is to apply the principles of equity and fairness in resolving any disputes arising under Labor Code §227.3. The Labor Commissioner, in an interpretive bulletin issued in 1986 allows a "cap" to be placed on vacation pay, but "the time periods involved for taking the vacation must, of course, be reasonable."

If an employee under your policy was employed from January 1, 1993, through December 31, 1993, that employee would be required to take his or her fully accrued vacation in January of 1994 in order to earn any more vacation credits.

To say that the employee is allowed to take his or her vacation during the year it is being earned without also stating that the employer is reserving the right to charge back the unaccrued vacation taken in the event of layoff or discharge is not fully explaining the policy. Obviously, employees who live from paycheck to paycheck could not afford to risk the loss of wages due at termination and would not, as a result, take the vacation until it is fully accrued. Additionally, employees with children in school would be rather reluctant to take vacations in the middle of the winter. However, under the policy you propose, a working mother who started in January would be forced to take her fully-accrued one week of vacation in January of the following year in order to avoid not earning future vacation benefits.

Under this type of policy, there is <u>no</u> time allowed the em-

ployee to take the fully accrued one week of vacation let alone a reasonable time within which to take the one-week without risking the loss of future vacation credits. What this policy, in fact, provides is a Hobson's choice for the employee:

> Either take the chance that the employer will not lay you off or discharge you within the period of time necessary to accrue the one week of vacation and take unaccrued vacation time which is subject to recovery by the employer from the final pay; or wait until the vacation promised is fully accrued and take the time off at that time (whether the time is convenient or not to the worker's schedule) to avoid losing future vacation credits.

That doesn't sound like equity and fairness to me. It does, however, smack of a subterfuge designed to deprive workers of future vacation benefits.

There are many plans available which will protect the employer from a "growing liability" which employers may face when employees fail to take vacation time off. The policy you propose is not one of the those plans.

A plan which provided that the employee has a minimum seven-month period in which to take vacation accured in the past year would be appropriate. The failure to take the accrued vacation within that period of time would result in no further vacation being accrued from that point on. That would allow the employee a "reasonable time" to take the vacation and would protect the employer from accruing a large liability.

I hope this adequately addresses the issues you raise in your letter of February 3rd. I believe this letter clearly sets out the position which the California Labor Commissioner will take in this matter. I see no reason for further correspondence.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
Deborah Granfield, Esq.