STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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MILES E. LOCKER, *Chief Counsel*

January 9, 1999

Jan Gabrielson Tansil
Spaulding McCullough & Tansil
3550 Round Barn Boulevard, Suite 306
P.O. Box 1867
Santa Rosa, CA 95402

Re: **Payment of Commissions Upon Termination of Employment**

Dear Ms. Tansil:

This is in response to your letter, dated November 5, 1998, asking for an opinion[1] from the Division of Labor Standards Enforcement as to when commissions must be paid to terminated employees. Your letter states that these employees receive a small base salary, with the majority of compensation in the form of commissions earned on retail sales under Industrial Welfare Commission ("IWC") Wage Order 7. You state that under this employer's unwritten policy, commissions are calculated monthly, a few days after the close of the "commission month", and that each current employee is paid his or her monthly commission earnings in two equal payments, with half paid on the 15th of the month and the remaining half paid on the first day of the following month. With respect to employees whose termination occurs at the end of the "commission month", you ask when commissions must be paid. You also ask, in the event that commissions are not timely paid to a terminated employee, when waiting time penalties would begin and end.

Labor Code sections 201 and 202 require the payment of all earned and unpaid wages at the time of termination in the event of a discharge, or within 72 hours in the event of a voluntary quit, unless the employee gave notice of intent to quit at least 72 hours in advance of the last day to be worked, in which case

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[1] In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court upheld the Labor Commissioner's authority to "provide parties with advice letters which are not subject to the rulemaking provisions of the APA." Courts may accord deference to such opinion letters under the standard set out in *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1.

the wages are due on the last day worked. These requirements cannot "in any way be contravened or set aside by a private agreement, whether written, oral, or implied." (Labor Code §219) Labor Code §200 defines "wages" to include "commissions." Thus, the provisions of sections 201 and 202 governing the payment of wages upon termination apply to any earned and unpaid commissions. The central focus of inquiry, therefore, must be on when the employee "earns" the commissions, rather than on when the employer subsequently calculates and pays these commissions to its current employees.

A commission is "earned" when the employee has perfected the right to payment; that is, when all of the *legal* conditions precedent have been met. Such conditions precedent are a matter of contract between the employer and employee, subject to various limitations imposed by common law or statue. Typically, in the retail sales industry, commissions may be "earned" when a sale is made, when the merchandise is delivered to the customer, or when the customer pays for the merchandise. Whatever the event (or events) that trigger the right to a commission, once that event (or events) have occurred, the commission has been earned. The provisions of any contract notwithstanding, courts will not enforce unlawful[2] or unconscionable[3] terms, and will construe any ambiguities against the employer to avoid a forfeiture[4]. Moreover, a discharged employee may assert common law doctrines such as "prevention" and "impossibility of performance" as a basis for recovering commissions despite having failed to perform all of the conditions precedent otherwise required. Finally,

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[2] In *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, the court held that deductions of unidentified returns from commissions of retail salespersons violates Labor Code §221, and unlawfully makes such salespersons the "insurers of their employer's loses." However, the court approved of deductions from a salesperson's commissions for returns of merchandise that were identified as having been sold by that salesperson.

[3] Compare *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796 [contract provision denying commissions on sales if customer payments are received after termination of employment held unconscionable; factors the court relied on included fact that this was an adhesion contract with no meaningful opportunity for negotiation, and that the forfeiture was overly harsh and not reasonable under the circumstances in that salespersons had few if any post-sale duties with respect to the customer] with *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386 [upholding contract provision forfeiting commissions on customer payments made more than 30 days after severance of employment, finding that forfeiture provision was clear, contract was the result of arms length negotiations between sophisticated and experienced parties of comparable bargaining power, and that forfeiture provision did not "shock the conscience."]

[4] Civil Code §1442

when a sale is preceded by solicitation and negotiation, California courts have long held that the salesperson who is the procuring cause of the sale is entitled to a commission even if the customer's order was subsequently received or taken by someone else[5].

In the event that commissions have been "earned" on or before the date of an employee's termination, the employer must complete the necessary calculations and pay the commissions on the date of the termination in the case of a discharge or a voluntary quit with more than 72 hours prior notice, or within 72 hours of the termination in the case of a voluntary quit without such prior notice. It is not permissible to wait until the customary time for calculating the commissions of current employees, nor is it permissible to delay payment of such earned commissions until the next regularly scheduled payday(s). If the commission has not yet been earned at the time of termination, and is awaiting the completion of some legal condition precedent (for example, receipt of the customer's payment), the commission must be paid to the terminated employee immediately upon completion of the conditions precedent.

With respect to the commencement of waiting time penalties, these penalties commence under Labor Code §203 at the "due date" for wages owed pursuant to Labor Code sections 201 or 202. Thus, in the case of a discharge or voluntary quit with at least 72 hours prior notice, section 203 penalties commence immediately upon termination of employment, and in the case of a voluntary quit without such prior notice, penalties commence 72 hours after the quit. Section 203 penalties run for thirty calendar days or until all wages due are paid or until the employee commences an action[6] for unpaid wages, whichever occurs first. Penalties are calculated without regard to the number of days the employee would have worked in this thirty day period. Rather, the employee's per diem wage rate is multiplied by the number of days of non-payment, up to this maximum of thirty days. Mamika v. Barca (1998) 68 Cal.App.4th 487.

As discussed above, a commissioned employee who was timely

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[5] See *Zinn v. Ex-Cell-O* (1944) 24 Cal.2d 290; *Willison v. Turner Resilient Floors, Inc.* (1949) 89 Cal.App.2d 589; *Wise v. Reeve Electronics, Inc.* (1960) 183 Cal.App.2d 4.

[6] The filing of a claim with the Labor Commissioner does not constitute the commencement of an "action" within the meaning of section 203, and does not cut off the running of waiting time penalties. *Cuadra v. Millan* (1998) 17 Cal.4th 855, 870; *Triad Data Services v. Jackson* (1984) 153 Cal.App.3d Supp.1.

paid all wages that were "earned" prior to his or her termination may subsequently "earn" additional commissions upon the post-termination completion of conditions precedent, such as the employer's receipt of customer payments. An employer's failure to pay any such commissions immediately once they are earned(that is, once the legal conditions precedent have been met), will subject the employer to section 203 penalties. These penalties would then commence on the date that the post-termination commissions must be paid, and would run for up to thirty days or until full payment is made or an action is commenced, whichever occurs first. See Cap Gemini America, Inc. v. Judd (Ind. App. 1992) 597 N.E.2d 1272.

It would be possible, in certain instances, to "bootstrap" penalties resulting from untimely payment of wages owed at termination, with additional penalties resulting from untimely payment of commissions earned after termination. For example, if an employee is discharged on May 10, and does not receive payment for all wages that were due upon termination until May 30, he or she would be entitled to twenty days of waiting time penalties. If that employee "earned" post-termination commissions on June 1, and was not paid those commissions until June 10, the employer would be liable for another ten days of penalties. Such "bootstrapping" is subject to two limitations: first, the total number of days of penalties stemming from any single termination of employment cannot exceed thirty days, and second, on any calendar day, only one day of penalties can accrue.

Thank you for your interest in California wage and hour law. We hope this letter will help you in assisting your client. Please feel free to contact this office with any other questions.

Sincerely,

Miles E. Locker

Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen

1999.01.09