STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, Room 3165
San Francisco, CA 94102
(415) 703-4159

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

May 17, 1993

Re: Vacation Pay Policy

Your letter requesting guidance in developing a vacation pay policy which will meet the requirements of *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, has been assigned to this office for review and reply.

The policy you attached provides:

1. Vacation does not accrue during the first year of employment.

2. After having completed one year of continuous service, full time employees will be entitled to one week of vacation. The employee may take the one week of vacation at any time during the second year of employment. [If] The employee does not complete his or her second year of employment, the one week of vacation will be prorated based on the number of days worked during the year. If an employee has taken vacation in excess of this prorated amount, the excess will be deducted from his or her final paycheck. An employee may not accrue additional vacation until the one week of vacation is taken.

The policy provides that in subsequent years the same policy will apply (i.e., the employee may take the vacation he or she is earning that year and that no further vacation may be accrued until that vacation is taken.)

Essentially, the policy provides that an employee would never accrue the vacation he or she is earning until after the year in which it was to be taken. The employee who hesitates to take unaccrued vacation time and waits until the vacation is fully vested would be penalized because that employee would lose at least one week of accrual toward the succeeding year's vacation.

"Use it or lose it" vacation provisions are not allowed. *Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1. As the Labor Commissioner recognized in 1986, there might be valid reasons for having a cap on vacation benefits, but as the Commissioner noted in Interpretive Bulletin 86-3*, page 3:

> "However, a variant of a "use it or lose it policy" which would be acceptable to the Labor Commissioner is a policy under which once a certain level or amount of accrued vacation or vacation pay is earned but not taken, vacation or vacation pay no longer accrues until vacation is taken. Such provisions, in effect, are a ceiling on the amount of vacation or vacation pay that can accrue without being taken. The time periods involved for taking vacation must, of course, be reasonable. If implementation of such a policy is a subterfuge to deny an employee a vacation or vacation benefits, the policy will not be recognized by the Labor Commissioner."

The "cap" is designed to assure that an employer's liability for vacation wages does not become overbearing.

In defining "reasonable" in this context, the Labor Commissioner has taken the position that a worker must have at least nine months after the accrual of the vacation within which to take the vacation before a cap is effective. This reasonable time allows an employee to take fully vested vacation at convenient times to both the employee and the employer without forcing an employer to accrue a large vacation pay (or time) liability.

Your letter states that you do not believe that the policy you propose is a subterfuge. We believe that it is clearly intended to thwart the *Suastez* doctrine; in that respect it is a subterfuge.

I hope this adequately addresses the issues you raise in your letter. Thanking you for your interest in California labor laws.

Yours truly,

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Policies and Interpretations Manual.