STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, Room 3166
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H. THOMAS CADELL, JR., *Chief Counsel*

May 10, 1995

Jeff Park
Employment Rights Attorneys
111 North Market Street, Suite 900
San Jose, CA 95113

Re: **Sales Commissions**

Dear Mr. Park:

The Labor Commissioner has asked me to respond to your letter of April 3, 1995, regarding the above-referenced subject.

In your letter you describe a payroll policy under which commissions are paid to salespersons upon the notification, by the salesperson, that the customer has confirmed an order. If, however, the customer subsequently fails to pay the bill or cancels the order the commission previously paid is backed out of outstanding commissions owed. The amount of the commission backed out is, as we understand, proportional to the commission paid as a result of the sale.

We find nothing impermissible in this policy. The policy is nothing more than an advance on commissions which the employer may recover in the event that the commissions do not vest.

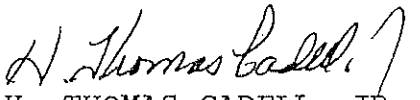
Your letter indicates, however, that if the employee, who, we assume, is the procuring cause of the sale, goes on a leave of absence and the customer confirms his or her order while the employee is on the leave of absence, the employee is not paid the commission which would have been due on the sale. You do not explain whether, in this hypothetical situation, there is any duty the employee must perform between the sale and the confirmation or whether, in fact, there is something which the employee must accomplish at the time of the confirmation. If there is nothing which the employee would be expected to do during that period in relation to the sale, it would appear that an argument could be made that the employer was unjustly enriched when he keeps the commission earned by the employee simply because the employee is on a leave of absence.

Your letter asks for an opinion as to whether such a policy would violate the California Labor Code. The Labor Code does not address the many types of contracts which may be used in employer-employee relations in California. The question of whether this policy would be valid would be a question involving California contract law found, generally, in the Civil Code and might even involve common law principles derived from caselaw. It would be these principles of law which both the courts and the Labor Commissioner would employ to adjudicate the case.

These questions are very fact intensive and do not lend themselves to answers that are simply black or white.

I hope this adequately responds to your letter of April3, 1995.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw