STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
gal Section
Van Ness Avenue, Suite 4400
San Francisco, CA 94102

September 24, 1990

W. L. Moffitt, President
ESP Personnel Services
12440 E. Firestone Blvd.
Norwalk, CA 90650

Dear Mr. Moffitt:

This letter is intended to respond to your letter of August 24th seeking the Division's opinion regarding your vacation pay policy.

While you only asked me to direct my attention to pages 8 and 9 of the handbook you enclosed, I found it necessary to carefully read the entire booklet so that I could give you an opinion of the material at pages 8 and 9 in context.

OUTLINE OF PROVISIONS:

It seems that you have chosen to lump all paid time off (including vacation, holidays, sick leave, personal days, etc.) into one category and refer to that category as "PTO". The policy statement (contained on unnumbered page entitled "PTO Program") provides that a specfic amount of "PTO" is credited to an employee for each payday employed (1 day if employed less than one year and 1.2 days if employed more than one year[1/]). The program is only available to "eligible employees" which, according to page 8 of the "Employee Handbook" you submitted are "[A]ll regular full-time employees...once they complete their probationary period." The handbook states at page 2 that "[T]he first 90 calendar days of your employment with the company are considered your probationary period." However, the handbook states that the company reserves the right to "extend this period whenever it deems such an extension appropriate." Apparently, the right to extend the probationary period is based on subjective indicia and that indicia, along with the length of the "extension", is up to the company. There is no indication as to when or, indeed, if, the employee is notified of his or her status as a regular full-time employee.

1/ The "Employee Booklet" provides that after four years of employment ("[D]uring each eligible employee's 5th and all succeeding years...") the credit will be 1.4 days.

The "Employee Handbook" provides that an eligible employee may accrue a maximum of PTO of 26 days with one year of service. The "Handbook" further states that in the event that the employee does not take off all of the days accrued, they may carry over only 10 days "after each anniversary date of their eligibility." The "PTO Program" explanation sheet states that the company understands that "illness is unavoidable" and it is for the "purpose" of assuring that the employee has available sick leave that the ten days are allowed to be carried forward.

According to the "Employee Handbook", the employer will cut a check in one-half of the net sum due for all days in excess of ten days and will deposit that sum in the eligible employee's savings account at the Whittier Area Schools Federal Credit Union. The remainder of the accrued time will be "forfeited."

Neither the "PTO Program" sheet nor the "Handbook" address the question of how much of the "PTO" is vacation and how much is for sick leave, holidays[2/], etc. The "Handbook" does provide that in the event of termination, the employee would be entitled to 38% of the PTO "paid"[3/].

LEGAL CONSEQUENCES:

The reason I have taken the time to outline, in detail, the provisions of the "Handbook" and the explanation sheet you appended is that there are more problems involved with your program than simply what portion of the PTO must be calculated as vacation and paid at time of termination.

2/ The holidays listed number seven, however, there is no discussion of what happens when the holiday falls on an employee's off day or during the employee's vacation period. Obviously, the employee would not find it necessary to draw from the accrued PTO in those events. Thus, it is impossible to say how much of the "PTO" is for vacation (and, consequently, subject to the provisions of Labor Code §227.3 and the case of Suastez v. Plastic Dress-Up (1982) 31 Cal.3d 774.

3/ The documents you submitted provide no definition for the word "paid" in this context. Presumably, it means "accrued" in this case because the money would not have been "paid" before that time.

Initially, you must set out some notice provision which will allow the employee to know when they have begun to accrue benefits. The Division enforcement policy does not preclude an employer from providing a reasonable probationary period before benefits begin to accrue. A ninety-day period would be reasonable. Further, the Division would not attempt to preclude an employer from extending a probationary period if the employer felt that it was a business necessity. There is, of course, currently no law which requires an employer to provide vacation benefits, holiday pay, sick leave, or health benefits. However, if you promise an employee such a benefit at the end of a ninety-day probationary period and then continue to employ the workers, it is implicit in that continued employment that they have passed probation and are accruing benefits. Absent an affirmative notice to the contrary, the Division and the courts) will assume that the benefits are accruing[4/].

Of course, since there is no provision in the law which requires that an employer provide the above benefits (including vacation pay), there is no requirement under the California Labor Code which would preclude an employer from promising a vacation to one employee while not providing another employee with that same benefit. However, where, as here, your company has adopted an employee Handbook, you are bound by the terms of that Handbook and the provisions of the law. Unless you have made written agreements with individual employees with terms different from those contained in the Handbook, the terms of the Handbook (as limited by the law) constitute the contract of employment.

It is the public policy of the State of California that Vacation pay is protected. This protection is set out in the terms of Labor code §227.3. Any vacation policy which purports to prevent vacation pay from accruing prorata or forfeits earned vacation, is, to that extent, void. Any employer policy which provides leave time is presumed to be vacation unless clearly defined otherwise. Leave time which is provided without condition is presumed to be vacation no matter what name is given to the leave.

4/ I should note at this time that if your company uses a probationary period during which no vacation is earned, the employee's "anniversary date" for vacation purposes must be at the end of the probationary period and may not be measured from the date the employee went to work for the company. So, also, if the employee was part-time and begins accruing vacation at the time he or she becomes full-time, the anniversary date for vacation purposes must be at the time the accrual began, not at the time the employee began work for the company. Any policy which makes the accrual retroactive will result in the DLSE disregarding the probationary period altogether.

Such an enforcement policy is necessary to insure that leave policies which are nothing more than vacation policies under a different name, are not employed as subterfuges to defeat the provisions of Labor Code §227.3 and the conclusion of the California Supreme Court in the case of Suastez v. Plastic Dress-Up (cited above).

With the above in mind, I must advise you that absent some objective standard by which the employee may determine the exact amount of the PTO which is designated as vacation pay, the whole of the PTO will be considered to be vacation pay. As you may know, vacation pay accrues as it is earned and may not be "forfeited". Since the whole of the PTO is vacation pay, the strict requirements of Labor Code §227.3 which prevent forfeitures of any kind must be applied. Consequently, this means that your firm's "use-it-or-lose-it" policy which provides for payment of only one-half of the accrued sum is invalid.

It is interesting to note that the policy provides that 38% of the PTO (accrued?) will be paid upon termination in the first year. Thirty-eight percent of twenty-six days would be 9.88 days. It may be argued that this may have been an attempt to designate ten days as the vacation period by "backing in" the figures; but such an attempt fails. First, as pointed out above, there is no way of establishing how much of the PTO is to be used as holiday pay because there is no discussion of what happens with the amount accrued for holiday pay when the holiday falls on a weekend, employee off day, or during an employee's vacation. Second, there is a provision for "personal days" (see "PTO Program" explanation sheet) which may be used "within reason". Clearly, these "personal days" are neither holidays nor sick days and appear to be available without condition (except 'within reason"). There would be no way of determining how many "personal days" and how many sick days one was entitled to. Consequently, all of the time would be considered under the vacation rules.

You state that the percentage you calculated "is the portion of accrued Paid Time Off which is intended to be vacation time." While that may have been someone's intention (9.88 days of vacation per year) it is not stated and may not be reasonably drawn from the face of the documents you submitted.

You state that a dispute has arisen regarding the amount due on termination; but you fail to state who the dispute is with. I assume the "dispute" is not before the Division. If the dispute is before the Division, I feel you have an obligation to advise both the affected employee(s) and the assigned Deputy Labor Commissioner of this letter.

I hope this adequately addresses the questions you raised in your letter. I believe that you could redraft your "Handbook" to provide a "cap" on the amount of vacation which an employee may accrue which, I believe, you were attempting to do. I suggest you contact private counsel in this regard.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel