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

January 7, 1991

Jonathan M. Brandler
Hill, Farrer & Burrill
445 South Figueroa Street
Los Angeles, CA 90071-1666

Re: Your Letter of November 30, 1990;
Opinion Regarding Proposed Vacation Plan

Dear Mr. Brandler:

Please excuse the delay in responding to your letter of November 30, 1990. However, a heavy caseload plus administrative matters coupled with the holiday schedule have made it impossible to respond in what would otherwise be a timely manner.

Your letter asks for an opinion regarding the validity of a vacation plan which states "that an employee will not accrue vacation in a new calendar year until he has used all of the prior year's vacation days." You state that:

> "As an example, if an employee used ten out of twelve vacation days which he accrued in 1990, on January 1, 1991, he would cease to accrue additional vacation days until the two remaining vacation days from the prior year were used. If the vacation days were used on February 2 and 3, 1991, the employee would begin accruing vacation days on February 4, 1991. No vacation days would have accrued from January 1, 1991 through February 3, 1991.

Initially, I must advise that I am confused by your reference to a calendar year. An employee's vacation accrues from the time he or she is employed (unless otherwise specifically provided by the company policy), not by the calendar year. If "calendar year" is important to the scenario you paint, I don't see the significance. However, if I am missing something, please let me know.

As you know, vacation pay policies which contain a "cap" on the amount of vacation an employee may earn are acceptable. Under these "cap" policies, there is a ceiling put on the amount of vacation time which may be earned. As the vacation time is used accrual begins anew and vacation time is replaced, up to the ceiling or "cap" imposed by the terms of the employment contract or

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policy. The purpose of the "cap" is twofold: 1) to encourage the employee to take vacation time off; and, 2) to prevent an employee from continuing to accrue vacation without taking vacation time off thus leaving the employer liable for unexpected extended leave periods or substantial unanticipated payments.

Your proposal would not encourage employees to take vacation time, it would simply penalize the employee who inadvertently failed to take all accrued time after reaching the "cap". The proposal could easily result in employees continuing to work while expecting that they were accumulating vacation pay after they inadvertently failed to take all of the vacation to which they are entitled. Additionally, since the use of a normal cap would accomplish the second purpose (i.e., to prevent the employee from continuing to accrue vacation time to the detriment of the employer), it would be unnecessary to provide the more draconian method you propose.

As you know, Labor Code §227.3 provides that the Labor Commissioner is to apply the principles of equity and fairness in the resolution of any dispute concerning vacation pay. Clearly, it would be neither equitable nor fair to penalize an employee for failing to take all of the vacation time they had accumulated. It would accomplish no legitimate purpose; but would simply penalize unsuspecting employees. On July 7, 1987, former Labor Commissioner Lloyd Aubry sent a letter[1] to an attorney in response to a question about the "cap" which may be put upon the accumulation of vacation. The Commissioner pointed out that "an employee must be given a fair opportunity to take vacation at reasonable periods of time so that he or she can stay below the cap and continue vacation accruals." Obviously, Commissioner Aubry contemplated that taking some vacation (but not all) would result in accrual continuing. The cap variant was never intended to result in an employee losing all accrual until all vacation time had been used.

The alternate plan which you submit again refers to "calendar year", and, as I stated above, I am confused by the use of this term in this context.

Of course, this alternate plan which you propose also suffers from the same problems as the other plan. The employee carries over the two days of vacation and, until he or she uses

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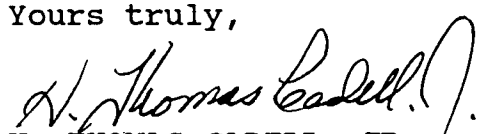
[1] I have attached a copy of the letter I refer to in this correspondence. I'm sorry, but I don't have a copy of the letter written by the attorney.

that two days, does not begin to accumulate more vacation. The only difference is that the accrual will begin anew when the period of time it would have taken to accumulate the carried over vacation expires. However, during that period of time no vacation accrues. Again, repeating what Commissioner Aubry said in his July 7, 1988, letter which I quoted from above, "An employee must be given a fair opportunity to take vacation at reasonable periods of time so that he or she can stay below the cap and continue vacation accruals." For the reasons stated above, this "variant" would not be acceptable to the Division.

I hope this adequately addresses the questions you asked in your letter of November 30, 1990. Again, please excuse the delay in answering that correspondence. I look forward to seeing you again in the spring of the year when the CBLI puts on another of its seminars.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry