STATE OF CALIFORNIA
Pete Wilson, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Legal Section
30 Van Ness Avenue, Suite 4400
San Francisco, CA 94102

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Howard S. Lavin, Esq.
Strook & Strook & Lavan
Seven Hanover Square
New York, N.Y. 10004-2594

Re: Opinion On Proposed Vacation Policy

Dear Mr. Lavin:

This is in response to your letter of May 10, 1991, wherein you ask for guidance regarding a vacation policy which your client proposes to adopt.

The statements contained in paragraphs (i) and (ii) are correct statements of California law.

The statement contained in paragraph (iii) to the effect that an employer may recover overpaid wages from the employee's final check, however, does not correctly state the current California law. The leading cases on the issues which are raised by the proposal to recover overpaid vacation wages from final pay are *Barnhill v. Saunders* (1981) 125 Cal.App.3d 1, and *California State Employees' Assn. v. State of California* (1988) 198 Cal.App.3d 374. In the *Barnhill* case, the court dealt with the question of what remedy an employer has to recover an amount of money advanced to an employee to as a loan. The promissory note carried an interest rate of 10% per annum and was to be repaid "by payroll deduction or upon demand." The *Barnhill* court first noted that the advance, as with any other debt owed (either to the employer or to a third party), would be subject to the provisions of the attachment law. Since the wages of the employee are exempt from prejudgment attachment and, thus, neither the employer (nor any third party) could recover the debt by way of attachment of the employee's final pay, the court reasoned that fundamental due process considerations prevented the employer from engaging in self-help by deducting the debt from the employee's final wages.

The *Barnhill* court explained that "[t]he policy underlying the state's wage exemption statutes is to insure that regardless of the debtor's improvidence, the debtor and his or her family will retain enough money to remain a productive member of the community."

Following the *Barnhill* decision, the First District Court of Appeal addressed the question of recoupment of advances on wages in the case of *California State Employees' Assn. v. State of California, supra.* In the *CSEA* case, the court was confronted with a state law which appeared to clearly allow a claim of money owed to the state to be recouped from the wages of the employees. However, the *CSEA* court, relying in part on the *Barnhill* decision, held that the "wage garnishment law and the attachment law protect wages from creditors. The wage garnishment law provides the exclusive judicial procedure by which a judgment creditor can execute against the wages of a judgment debtor, except for cases of judgments or orders for support." As the *CSEA* court pointed out, "[p]resumably, wages actually earned during the current pay period are due, and the fact that the employee owed a debt [to the employer], even for a prior overpayment, does not 'affect the validity or alter the amount of the [current] claim' for wages earned." It was at this point that the *CSEA* court cited to *Randone v. Appellate Department* (1971) 5 Cal.3d 536, which, of course, relied upon the U.S. Supreme Court decision in *Sniadach v. Family Finance* 395 U.S. 337 (1969) which held that a prejudgment attachment of wages violated the due process clause of the United States Constitution.

As you can see, the law in this area has been clearly defined. An employer may not recover debts owed to the employer by an employee from the wages then due to the employee. The recovery of the vacation pay prepayment from the final check would violate the public policy considerations underlying the wage exemption statutes. Allowing the recovery from the final pay could lead to a situation where an improvident worker, who had already spent the sizable advance, would be left without "enough money to remain a productive member of the community."

The proposal you submit differs from the situation where an employer makes regular advances as a draw on future commissions. In those circumstances, the "draw" is only recoverable from the commissions as they become due. The employer could conceivably bring an action to recover excess draws if that was the agreement (See *Agnew v. Cameron* (1967) 247 Cal.App.2d 619), but could not recover the excess draws from the employee's final pay unless the final pay constituted commissions.[1] The rationale underlying this

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[1] Of course, if the final pay represented a minimum sum due (such as a statutory minimum wage or a minimum set by the contract of employment), the overpaid draws could not be recovered from the final paycheck. The minimum (whether it be statutory or contractual) must be paid under all circumstances.

relatively common procedure is, of course, that the employee has already been paid part of the commissions due as they were being earned pursuant to the agreement with the employer.

It is also possible to make an advance on wages which have already been earned before the time arrives for the payment. For instance, assume that an employer makes an advance to an employee of a small amount during the first week of a two-week pay period with the understanding that the advance is to be repaid from the employee's check. So long as the advance was made within the pay period, that advance may be recovered from the employee's next pay check (even if the next pay check happens to be the employee's final paycheck).

Paragraph (iv) of your letter is a correct statement of California law. As to paragraph (v), I assume that the prospective change would not deprive any employee of the vacation wages earned during the period April 1 through June 30 of the first year of the implementation of the new vacation year. If that assumption is correct, the employer may change the vacation plan prospectively at any time. There is no requirement in California that vacation be offered. The only requirement is that if vacation is offered, it must meet the requirements of Labor Code §227.3 and the *Suastez* decision.

I hope this adequately addresses the issues you raised in your May 10th letter. Thank you for your interest in California labor law.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

√c.c. James Curry