

DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF LABOR STANDARDS ENFORCEMENT

## LEGAL SECTION

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H. THOMAS CADELL, JR., Chief Counsel

April 19, 1993

Jenifer C. Chalk  
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ENVIPCO  
11240 Waples Mill Rd.  
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Re: DLSE Interpretive Bulletin 85-3

Dear Ms. Chalk:

Your letter of March 31st addressed to the State Labor Commissioner regarding the above-referenced topic has been referred to this office for response.

You first ask for a clarification of the terms "simple negligence" and "gross negligence". You specifically ask which category loss of a very expensive piece of equipment would be placed.

The price of the equipment is not a determinative factor. It is doubtful that an employee who "loses" anything is guilty of "gross negligence." The term "gross negligence" means the want of even scant care or an extreme departure from the ordinary standard of conduct. *Van Meter v. Bent Construction Co.*, 46 Cal.2d 588 (1956). Simple negligence would be any departure from the ordinary standard of conduct.

You next ask what "rate of reimbursement" the employer may seek in the event of "gross negligence". That question is best put to a court, not to the Labor Commissioner. The ideal remedy of an employer is to seek recovery for the "damages" suffered in a court action.

This brings us to the final question you ask: "can the loss be deducted from a final paycheck?" As we discuss below, while the Wage Order appears to endorse such a deduction, in the opinion of the Labor Commissioner, employers should not attempt such self-help methods.

The California Industrial Welfare Commission Orders provide, at Section 8, that a deduction may be made from the wages of an employee for loss caused by "a dishonest or willful act, or by the gross negligence of the employee." However, two California cases

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have addressed the issue of deduction from wages and reached the conclusion that such deductions are illegal. Since the provisions of the Order is clear and unambiguous, the DLSE will continue to enforce the provisions. However, for some time now the Division has cautioned employers that such cases as *Barnhill v. Saunders* (1981) 125 Cal.App.3d 1, 177 Cal.Rptr. 803, and *CSEA v. State of California* (1988) 198 Cal.App.3d 374; 243 Cal.Rptr. 602 which cite *Kerr's Catering v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 369 P.2d 20, 19 Cal.Rptr. 492, both for its holding and clear statement of public policy, demonstrate that the courts, if called upon, might not uphold Section 8 of the Orders.

The case of *Barnhill v. Saunders* clearly holds that:

"The 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 maintain a basic standard of living, so that the debtor may have a fair chance to remain a productive member of the community. Moreover, fundamental due process considerations underlie the prejudgment attachment exemption. Permitting [the employer] to reach [the employee's] wages by setoff would let [the employer] accomplish what neither it nor any other creditor could do by attachment and would defeat the legislative policy underlying that exemption. We conclude that an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (Emphasis added; citations omitted)

The *Barnhill* decision was decided subsequent to the promulgation of the 1980 Orders. Of course, the IWC did not change the language in either the Order or the Statement of Basis in the newer version of the Orders. However, the fact that the Commission states that they saw no reason to change the language may be attributed to the fact that no one brought the issue to their attention during their hearings.

The case of *People v. Industrial Welfare Commission*, Santa Cruz Superior Court No. 85071, (an unreported case which was affirmed in the Sixth District Court of Appeal) rested on the same principles which are applicable in this matter. There the court struck down the second sentence of Section 8 of the Orders based on the language in *Kerr Catering* which holds that the wages due belong to the employee, not the employer. The Supreme Court in *Kerr* went on to note that "It is doubtful that an employer with an unliquidated claim for damages against an employee would be permitted to withhold wages due the employee where such wages could not be

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reached by the employer as a judgment creditor." *Kerr Catering* (1962) 57 Cal.2d 319 at 325-326. The *Barnhill* court, relying on the law which came in the wake of *Sniddach v. Family Finance*, 395 U.S. 337 (1969), simply restated the *Kerr Catering* court notation in its 1962 decision which had held only that it was "doubtful" that such a withholding was allowed.

The language of Section 8 of the Orders simply flies in the face of the decisions in *Barnhill* and *Sniddach*. The language, indeed, flies in the face of *Kerr* insofar as it allows the employer to recover absent a "liquidated" claim and based simply on the employer's allegation that the conduct of the employee constituted "gross negligence". There could very well be good reasons for the failure of the employee to return the equipment; perhaps it was stolen from him or her or was destroyed through no fault of the employee. As the Supreme Court in *Kerr Catering* said, an employer can not make the employee the guarantor of his business losses.

The provisions of the IWC Order impliedly allows the employer to make the initial determination as to whether "gross negligence" exists. Such a determination, of course, is for a court to make, not a party to the employment contract.

There is a remedy available to the employer under California law to protect himself against loss of goods entrusted to the employee. By requiring a bond pursuant to Labor Code §§ 400-410 the employer may litigate any loss he allegedly suffers and recover the damages from the bond. The language used by the IWC in the Statement of Basis to the effect that they considered the provisions of Labor Code §400 et seq., to be "cumbersome" is an unfortunate choice of words. The Legislature set up the procedure and if it doesn't work because of cumbersome procedures the remedy is to go to the Legislature and have the law changed. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are void. *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347. However, the cumbersome procedure in Labor Code §400 et seq., is actually a formalized system designed to protect the interests of both the employer and the employee.<sup>1</sup> The *Kerr Catering* court addressed the question of the use of Labor Code Sections 400-410 and held that these sections:

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<sup>1</sup> For instance, the bond money which is in a separate account is not subject to a money judgment except in an action between the employer and employee. This protects the money in that account in the event either the employer or the employee has serious financial difficulties. Such protections are not available under the IWC's "alternative" program.

"Set out in detail the employee's bond law and the manner in which a cash bond may be extracted from an employee to cover merchandise entrusted to him. It provides a criminal penalty for the violation of its provisions. These<sup>2</sup> deductions from wages due appear to be in contravention of the spirit, if not the letter, of the Employee's Bond Law.

...

"The use of the device of deductions creates the danger that the employer, because of his superior position, may defraud or coerce the employee by deducting improper amounts.

...

"A further reason for legislative disapproval of deductions exists in the reliance of the employee on receiving his expected wage, whether it be computed upon the basis of a set minimum, a piece rate, or a commission. To subject that compensation to unanticipated or undetermined deductions is to impose a special hardship on the employee."

On the other hand, the IWC Commission's "alternative" of allowing the employer to recover the sum he feels is due from the final pay of the employee leaves the employee with no alternative except to sue to recover the money he or she feels is due. Many times the amount is so small that bringing a claim to the Labor Commissioner and missing two or three days' work attempting to recover the money is not worth the hassle. Also, if the employer goes bankrupt or a corporate employer ceases doing business, the employee simply has no remedy.

Labor Code §224 provides the guidelines for deductions from wages:

"The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law<sup>3</sup> or when a deduction is expressly authorized in writing by the employee to cover insurance

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<sup>2</sup> The deductions made by the employer in the *Kerr's Catering* case involved shortages from inventory which the employer had entrusted to the employee.

<sup>3</sup> The IWC Orders are regulations, not laws.

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premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage..."

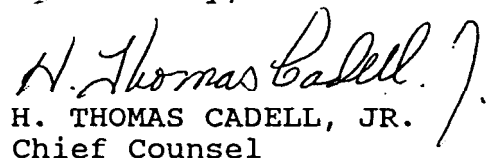
As the Attorney General concluded in 1944, this language permits deductions only where the item is "for the benefit of the employee, not the employer". (3 Op.Atty.Genl. 178, 179) The recovery of the cost of the uniform or equipment would obviously be for the benefit of the employer and would not be permitted under the provisions of Section 224.

In summary, it is entirely possible that the provision of Section 8 of the Orders which allows an employer to recover damages allegedly suffered by the employer from the final pay of the employee is void as against public policy. The "spirit", if not the "letter" of the Employee Bond law requires that employers must use that vehicle to protect themselves against the occasional employee who has larceny in his heart.

The Division has notified the IWC of its position in regard to the validity of the Orders. The Division will continue to enforce the sections absent a court ruling to the contrary. However, the employer community should be aware that the provisions of Section 8 are subject to review by the courts at any time and employer policies which utilize that statute may be found void.

I hope this adequately addresses the questions you raised in your letter.

Yours truly,

  
H. THOMAS CADELL, JR.  
Chief Counsel

c.c. Victoria Bradshaw  
Karla Yates, Executive Officer, IWC

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