STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, Room 3166
San Francisco, CA 94102
(415) 703-4150

H. THOMAS CADELL, JR., *Chief Counsel*

August 18, 1993

Ralph L. Hawkins, Esq.
Davis, Wright, Tremaine
1501 Fourth Avenue
Seattle, WA 98101-1688

Re: **PayLess Drug Stores Vacation Policy**

Dear Mr. Hawkins:

This is intended to respond to your letter of May 20, 1993, wherein you advised this Division that your client, PayLess Drug Stores Northwest, Inc., will revise its vacation policy to provide:

> Vacation will be earned day-by-day throughout the fiscal year and vacation earned but not used may be carried over until the next year. Vacation will continue to be earned in the following year for nine months regardless of the amount carried over. After nine months, the cap will be applied and no further vacation will be earned until vacation is taken.

In your past proposals you have suggested a policy which provides that an employee would earn one week of vacation as he works but must take the vacation accumulated in the year that it is earned. As we have pointed out, that is not a "reasonable" cap. Such a proposal would force an employee to either take vacation before it was fully vested (risking a requirement that any time taken and not vested would be recoverable from final wages earned) or, in the alternative, not earning vacation after full vesting of the one week until that time is taken.

Initially, I think we should point out that California law requires that vacation be earned day-by-day and that it vest in that manner as well. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774. California law will allow a reasonable "cap" to be placed on the amount of vacation which may be accrued. *Boothby v. Atlas Mechanical* (1992) 6 Cal.App.4th 1595; *Thomas Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1. However, we believe that you continue to misconstrue the use of the "cap" provisions.

In the case of *Boothby v. Atlas Mechanical, supra*, 6 Cal.App. 4th 1595 at 1601-1602, the court described the difference between a "use it or lose it type of policy and a "cap" on accrual:

> A "use it or lose it" vacation policy provides for forfeiture of vested vacation pay if not used within a designated time, while a "no additional accrual" vacation policy prevents an employee from earning vacation over a certain limit. Although both policies achieve virtually the same result, the former is impermissible and the latter permissible. This distinction is consistent with Suastez. Because vacation in an amount established by the employment agreement is deferred compensation for services rendered, the right to paid vacation vests as the employee labors. It is nonforfeitable. However, if the employment agreement precludes an employee from accruing more vacation time after accumulating a specified amount of unused vacation time (a "no additional accrual" policy), the employee does not forfeit vested vacation pay. A "no additional accrual" policy simply provides for paid vacation as part of the compensation package until a maximum amount of vacation is accrued. The policy, however, does not provide for paid vacation as part of the compensation package while accrued, unused vacation remains at the maximum. Since no more vacation is earned, no more vests. A "no additional accrual" policy, therefore, does not attempt an illegal forfeiture of vested vacation. As stated in *Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1, 272 Cal.Rptr. 134, the law does not prevent an employer from "announcing a level beyond which additional vacation time would no longer accrue. This would prevent additional vacation from vesting after a certain level had been reached. However, once vacation time has vested, it cannot be divested. There is an obvious difference between a policy which prevents additional vacation time from accruing after a certain amount of such time accrues and a policy which would divest an employee of already accrued vacation time." (*Id.* at p. 5, 272 Cal.Rptr. 134; see also *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 990-992, 152 Cal.Rptr. 267.)

As you can see, the courts recognize that the legality of a policy which would simply put a cap on the total amount of vacation which could be earned depends on the cap being definitive. But your proposal would allow an employee to earn up to 17½ days of vacation credit and then preclude the earning of any further vacation until the amount "to the [employee's] credit is reduced below 10 days." Aside from the fact that you don't explain what happens then, such a proposal would clearly not be a cap; at best it would be two caps. In other words, the cap is first placed at 17½ days and then drops to 10 days.

As the *Boothby* court pointed out, Labor Code § 227.3 provides that the Labor Commissioner is to "apply the principles of equity and fairness" in enforcing Labor Code §227.3. I have repeatedly explained this to Ms. Debra Granfield and, quite frankly, she seems to understand this concept. Aside from the fact that, as I pointed out above, it is difficult to picture the full ramifications of the proposal you submit[1], even if the proposal were not clearly at odds with a reasonable description of a "cap" on accrual as delineated by the California courts, it is neither fair nor equitable to the employee.

I note that your newest proposal does initially provide a nine month period within which to take the vacation earned in the first year. This is a start. You have put a cap on the amount of vacation which may be accumulated at 17½ days. However, the subsequent decrease in the accumulated credits available to the workers is fatal to the plan.

Obviously, I am not going to be able to send you a letter confirming your proposal. It is the position of the Division of Labor Standards Enforcement that our position is supported by both the case law and the statute. I am disappointed that you do not agree.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw, State Labor Commissioner

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[1] While we are not going to accept a policy which purports to reduce the total vacation which may be accrued once a "cap" is reached, your letter fails to even explain what, under your proposal, would happen if we were to accept such a result and the employee reduced the amount to under 10 days. Simply as a matter of curiosity, would you then have the "cap" reduced to the ten days we would not agree to originally?