STATE OF CALIFORNIA
PETE WILSON, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

January 27, 1994

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Re: **Employer Charge For Cost Of Processing Lost Or Stolen Payroll Check**

Dear Mr. Sagaser:

The Labor Commissioner has asked me to reply to your letter of November 3, 1993, regarding the above-referenced issue. Specifically, you ask for an opinion as to whether an employer may charge an employee for the cost of replacing a lost or stolen payroll check.

In your letter you point out that the California Supreme Court in the 1962 case of *Kerr's Catering v. DIR* (1962) 57 Cal.2d 319, 369 P.2d 20, 19 Cal.Rptr. 492, concluded that cash losses resulting from employee mistakes or simple negligence are a business risk which must be borne by the employer. You also correctly point out that the Labor Commissioner's Interpretive Bulletin 85-3 concluded that employers could require employee reimbursement for losses in situations where the <u>employer can prove</u> that the loss is due to a dishonest or willful act of the employee or due to the employee's gross negligence. As you note in your letter, Commissioner Aubry, in the 85-3 Bulletin concluded that an employer who makes a deduction from an employee's wages acts at his peril since the burden of proof rests on the employer.

As the Labor Commissioner has cautioned in many letters since that time, even the analysis contained in Bulletin 85-3 may be rejected by the courts in view of more recent caselaw. (See *California State Employee's Assn. v. State of California* (1988) 198 Cal.App.3d 374; 243 Cal.Rptr. 602, as an example) In addition, in an unpublished case involving the Division, the Sixth District Court of Appeal held that the portions of the IWC Orders which allowed deductions from wages were invalid.[1]

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[1] The language found objectionable by the court has since been removed from the Orders.

The question of deduction from wages was addressed in the case of *Barnhill v. Saunders* (1981) 125 Cal.App.3d 1, 177 Cal.Rptr. 803[2] and was revisited in the *CSEA v. State of California* case. The concept of the sanctity of wages has been discussed frequently in California[3]. The United States Supreme Court in the case of *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) held that "[W]here the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing..." due process is violated. (Citations omitted.) Essentially, what the High Court struck down was the right of a "putative" creditor to use the "legal" apparatus available to hold his "presumed" debtor's wages. The sanctity of wages precluded such a withholding absent a legal determination that the debt was owed. California has recognized and applied the principles of *Sniadach* in such decisions as *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 96 Cal.Rptr. 709, 488 P.2d 13 and *Blair v. Pitchess* (1971) 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242.

From your letter it is clear that you feel that the employer need not even employ the "legal" apparatus utilized by the Family Finance Corporation. However, you fail to point out how the employer differs from any other supposed creditor. It certainly cannot be as a result of the contractual relationship. Else, as a result of the mutuality of remedies which must be present in any valid contract, the employer/employee relationship would give the employee the right to take such funds as he or she feels are owed from the employer's funds entrusted to him. Clearly, the rationale underlying contract law would require that such a unique remedy, if available to the employer, would also be available to the employee. Surely, the employer community would not embrace such a concept; nor would the Labor Commissioner.

In your letter you state that the loss of a payroll check is not analogous to cash loss by an employee and, you conclude, such a loss is not, therefore, in the category of a normal business loss. You fail to explain, however, how your conclusion might impact on the law.

A check is simply a promise to pay and, until it is negotiated, it remains nothing more than a promise to pay. Obviously, the employer's account is not affected until the check is presented for payment.

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[2] The Division rejects your conclusion that because the *Barnhill* case, on its facts, addressed final pay that the rationale does not extend to so-called "self-help" remedies during the course of the employment.

[3] In re: Trombley (1948) 31 Cal.2d 801; 193 P.2d 466; *Kerr's Catering v. DIR, supra,* 57 Cal.2d 319; 369 P.2d 20; 19 Cal.Rptr. 492; *Quillian v. Lion Oil* (1979) 96 Cal.App.3d 156; 157 Cal.Rptr. 740.

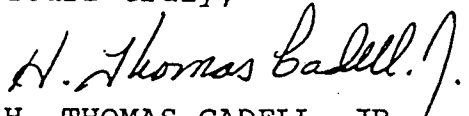
In the event you wrote a check to your local gas and electric company and the company subsequently told you that it had no record of the check, it would do you little good to demand that you be given credit for "the cost of replacing" the check before you paid the unpaid bill. The fact is, as with the wages of the worker, there is no proof of payment of the debt to the utility until the check is negotiated.

Viewing the current state of the law, the Labor Commissioner concludes that any deduction by an employer for costs associated with the reissuance of a payroll check would be a violation of Labor Code §224.

The employer may have a cause of action against the employee for recovery of costs associated with the reissuance of a payroll check. In such an action, of course, the employer would bear the burden of showing that the actions of the employee resulted in the loss suffered by the employer. However, even if the employer were successful in the action to recover these costs, the employer would not be able to deduct the cost from the employee's wages absent a court-ordered garnishment. Such a garnishment action would be subject, of course, to all of the defenses available under the wage earners exceptions.

I hope this adequately addresses the issue you raised in your letter of November 3rd. Please excuse the delay in response.

Yours truly,



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c.c. Victoria Bradshaw, State Labor Commissioner