STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
45 Fremont Street, Suite 3220
San Francisco, CA 94105
(415) 975-2060

MILES E. LOCKER, *Chief Counsel*

September 17, 1998

Mr. Pepe Rodarte,
Personnel Manager
Babbage's Etc.
2550 William D. Tate Ave.
Grapevine, TX 76051

RE: Vacation Policy--Labor Code Section 227.3

Dear Mr. Rodarte:

This is in response to your letter of August 10, 1998, to Senior Deputy Labor Commissioner Ysmael Raymundo, requesting an opinion as to whether the Company Vacation Policy you enclosed (including proposed amendments and/or clarifications under the title "Revised Vacation Policy Clarification") complies with California law. Under the policy, employees do not commence to earn or accrue vacation until semi-annual target dates six to twelve months after attaining full time employment. Thus an employee hired between January 1 and June 30 would commence earning vacation on January 1 of the following calendar year, and employees hired between July 1 and December 31 would commence earning vacation on July 1 of the subsequent calendar year. Under the policy, vacation is to be taken in the calendar year in which it is earned, and cannot be "cashed out" except in the case of employees whose employment is either terminated or converted to part-time employment, which case pro-rata calculation of earned vacation is paid. Vacation is "credited" for use by the employee on January 1 and July 1, respectively, with vacation time available for use as of January 1 not being fully earned/accrued until June 30 of the same calendar year, and vacation time available for use as of July 1 not being fully earned/accrued until December 31 of that calendar year. The policy prohibits employees from taking vacation time "during the November and December holiday season." It is unclear whether this refers to two different time periods (surrounding Thanksgiving and Christmas, I would presume), or whether it encompasses the period from Thanksgiving through Christmas or New Year's eve.

The policy further states that vacation cannot be carried over into subsequent calendar years. You describe this in your cover letter as a "use it or lose it" policy, but also state in your letter that California employees "are required to take vacation or may carry it over if necessary." I could not find any language in the written policy to this effect either in the written "Vacation Policy" you supplied, nor in the "Revised Vacation Policy Clarification." The only reference in either document specifically states, "Available vacation does not accumulate from one year to the next."

"Use it or lose it" vacation policies are prohibited by Labor Code 227.3, See *Boothby v. Atlas Mechanical*, 6 Cal. App. 4th 1595 (1992); *Berardi v. General Motors*, 143 Cal. App. 3d Supp. 7 (1983). A policy which prevents employees from accruing additional vacation time until using some reasonable amount of already accrued vacation (commonly referred to as "reasonable cap") is lawful under Section 227.3, but the policy must specifically describe the cap. The policies you provided do not qualify. It is unlikely that any vacation policy in which the vacation is not completely earned until late December, a period during which the policy prohibits the employee from taking any vacation, would be considered lawful in any case, since this puts the employee in the untenable situation whereby the employee risks taking the vacation time prior to it being earned and subjecting the employee to either unlawful deductions or a lawsuit against advances not earned in the event his or her full time employment ceases, or having the vacation earned erased at the stroke of midnight on December 31. Moreover, DLSE has consistently taken the position that a reasonable cap on accrued vacation cannot occur unless the employee is given a reasonable period **after** the vacation is earned (usually not less than seven months) to use the accrued vacation. Prohibiting employees from accruing additional vacation during this period, in the judgment of the Division of Labor Standards Enforcement, violates Section 227.3, which charges the Labor Commissioner, the chief executive officer of DLSE with applying "principles of equity and fairness" in enforcing that section.

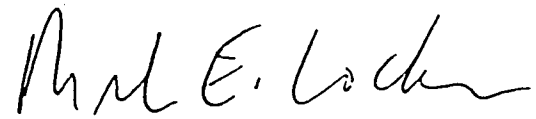
Another portion of the vacation policy and revised clarification also appears to violate California law. The policy states that employees whose employment is terminated will be paid for unused vacation on the employee's next regular check. Labor Code Section 201 provides that employees who are terminated must be paid all earned wages immediately at the time of termination. Section 202 provides that employees who resign must be paid all earned wages within 72 hours, unless notice of intention to quit was given 72 hours prior to the actual cessation of employment, in which case the employee must be paid all earned wages at the time of quitting. In other words, you cannot wait until the next regular payday to pay the unused vacation, since under Section

227.3 the vacation constitutes earned wages.

Your "Revised Vacation Policy Clarification" also states that employees who "borrowed vacation before it has been accrued/earned .... would only be paid the [earned portion]." It is unclear how this would operate, since the employee in this scenario has already taken and been paid for the "borrowed" vacation. If your policy is suggesting that a deduction would be taken from the employee's final paycheck for hours actually worked, such a deduction is illegal under California law. See *CSEA v. State of California,* 198 Cal. App. 3d 374 (1988).

I hope this responds to your questions. If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen
Ysmael "Ray" Raymundo