

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

Santa Rosa Legal Section

50 D Street, Suite 360

Santa Rosa, CA 95404

(707) 576-6788

H. THOMAS CADELL, *Of Counsel*

December 9, 2002

William J. Carroll, Esq.
Morgenstein & Jubelirer LLP
One Market Street
Spear Street Tower, 32nd Floor
San Francisco, CA 94105

Re: **Commission Payments** (00229)

Dear Mr. Carroll:

This is in response to your letter of October 7, 2002, directed to Labor Commissioner Arthur Lujan, concerning the above-referenced subject.

In your letter you seek an opinion regarding the requirements of California Labor Code § 204 as they relate to the timing of commission payments to sales employees engaged in origination of home mortgage loans. The employees in question are compensated by your client through a combination of draws and commissions. Pursuant to a written compensation agreement, draws are paid on a bi-weekly basis and commissions are paid on a monthly basis. The commission due on a given loan is calculated by means of a formula consisting of the loan amount, multiplied by the applicable commission rate. Commissions vary, depending upon the source of the loan and the total monthly volume of loan closings¹. Consequently, the commission rate cannot be determined until after the month is completed and the total closings are calculated.

You attach a copy of Opinion Letter 1993.03.08 which dealt with commission payments of account executives for a national advertising firm. While that portion of the letter dealing with the applicability of Labor Code § 204 is relevant, the letter addresses issues in a unique sales environment (advertising) and deals with "outside sales". For those reasons, some of the 1993 letter is not relevant to the situation you describe.

As the 1993 letter recites, DLSE does take the position that Labor Code § 204 does not provide a test as to when commission wages are calculated.

¹It is not entirely clear whether the "loan closings" represent all loans closed by the firm or department of the firm during the month, or those loans closed by the individual employee. For purposes of this letter we assume the closings represent the loans closed by the individual employee.

Commission programs which calculate the amount owed once a month (or less often) are common. Commissions are due and payable after the reasonable conditions precedent of the employment agreement have been met. If commissions cannot be calculated until after an event has happened then the commissions are not "earned" within the meaning of Section 204 until the happening of that event so long as the event is reasonably tied to the calculation. So long as the agreement is clear and unambiguous, and the draw² is paid in a timely manner, the commission is not "earned", within the meaning of Section 204, until the agreed calculation becomes ascertainable.

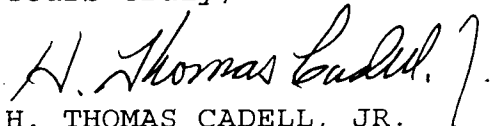
The program you describe in your letter which calculates and pays the commission once a month as soon as the applicable commission rate can be determined would appear to meet the requirements of Labor Code § 204.

It is important to point out, as well, that in cases where the commission cannot be ascertained until the happening of a condition subsequent, the imposition of penalties under Labor Code § 203 in the event of termination of employment (see Labor Code §§ 201 and 202) would not be appropriate. Those commissions which were not reasonably ascertainable would not be "due".

We would also note that you mention that in the 1993 letter the DLSE opined that many of the issues which arise in employment contracts are not addressed in the Labor Code. As you state, we pointed out in the 1993 letter that the interpretation of common law contract doctrines are within the sole discretion of the courts. We, of course, stand by that statement; however, we would not want there to be any question that, in fact, the Labor Commissioner has the authority to adjudicate employment contract disputes (Labor Code § 96), applying the common law concepts which have been adopted by the courts. We pointed out that most employment contracts are contracts of adhesion the terms of which are most strictly construed against the employer.

We hope this adequately addresses the issues you raised in your letter to Commissioner Lujan. We thank you for your continued interest in California labor law.

Yours truly,



H. THOMAS CADELL, JR.
Attorney for the Labor Commissioner

²Unlike the situation in the 1993 letter which dealt with outside sales, the employees you describe would be subject to the IWC Orders and, consequently, the draw paid must provide for at least minimum wage for all hours worked in the pay period. Overtime wages earned in the pay period must be paid no later than the following pay day.

c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
Assistant Labor Commissioners
Regional Managers