

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

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H. THOMAS CADELL, *Of Counsel*



January 21, 2003

Thomas N. Makris
Pillsbury Winthrop
400 Capitol Mall, Suite 1700
Sacramento, CA 95814-4419

Re: **Vacation Pay** (00262)

Dear Mr. Makris:

Your letter of November 26, 2002, addressed to Arthur Lujan, State Labor Commissioner, has been assigned to this office for response on behalf of the Division of Labor Standards Enforcement.

Your letter seeks an opinion from the Division regarding a change in a vacation pay plan which your client proposes. Under the current plan, vacation pay is based strictly on the hourly rate of wages which the employee earns. Consequently, an employee working a night shift for which a 10% shift differential is paid, will receive a vacation payment which reflects the 10% shift differential. Your client proposes changing this payment schedule to delete the shift differential from the vacation payment. Thus, an employee working on a shift for which he or she receives the bonus shift differential will, in the future, receive the same vacation payment as the employee working a shift without the bonus shift differential.

Labor Code § 227.3 provides:

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer

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policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

The above Labor Code section deals primarily with the protection of the vested vacation earned by the employee in the event of termination. The law directs the Labor Commissioner to enforce the "contract of employment or employer policy" with respect to vacation pay, but does not require that an employer have a vacation policy or, if the employer does have such a policy, does not dictate the terms of the policy respecting the amount paid. Most vacation policies are based on the wage paid to the worker on a regular basis. However, under California law, an employer may choose to have a vacation policy which promises to pay a sum while the employee is on vacation which bears no relationship to the wage normally paid to the worker.

The Labor Commissioner is required to exercise "equity and fairness" in the resolution of any dispute dealing with the payment of the vested vacation. The law does not, however, purport to allow the DLSE to test the measure of the amount of pay promised for the vacation time. (See O.L. 1986.11.17)

Consequently, we agree with your conclusion that the term "final rate" as used in Section 227.3 refers to the final rate at which vacation benefits would be paid under the applicable contract or employer policy were the employee to take vacation. Thus, your client would be in compliance with the California law if the proposed plan were adopted.

You note in your letter that when the new policy goes into effect, the client intends to make a one time lump sum payment to each of its California employees on the swing and night shifts equal to the number of hours accrued, unused vacation time the employee has earned as of that date multiplied by the per hour dollar value of the employee's shift differential. You state that you do not believe that such a payment is necessary. We disagree. The employees worked the hours in anticipation of receiving vacation pay based on the current system (i.e., vacation paid based on the hourly rate in effect at the time the employee takes his or her vacation). That vacation time is vested at the rate the vacation was earned and, thus, your client would be obligated to pay those hours under the current system. Failure to make the payment as you describe would result in the difference being owed in the event of termination.

We would agree that an employer may, prospectively, change

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the rate of pay of the employee and, thus, change the amount due the employee at time of termination. However, what your client proposes is a change in the "method of calculation" of the vacation. Any change in the method of calculation would require that the employees be paid for the time vested under the previous method.

We hope this adequately addresses the issues you raised in your letter. Thank you for your interest in California labor law.

Yours truly,

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

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

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