STATE OF CALIFORNIA GRAY DAVIS, Governor

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*

January 28, 2003

Zara J. Santos
Keesal Young & Logan
4 Embarcadero Center, #1500
San Francisco, CA 94111

Re: **Waiting Time Penalties And Unused Vacation**

Dear Ms. Santos:

This letter is in response to your letter of January 27, 2003, directed to the DLSE Information Center. Because of the nature of the message, we felt that it was more appropriate to respond in the form of a written letter.

In your letter you seek clarification on the following issues. We will respond to each question separately:

1. Are waiting time penalties under Labor Code § 203 calculated based on a base salary or total compensation (which includes guaranteed bonuses to be paid at the end of the year)?

As stated in the recent California case of ***Mamika v. Barca*** (1998) 68 Cal.App.4th 487, 492: "The reasons for this penalty provision are clear. 'Public policy has long favored the "full and prompt payment of wages due an employee".'"

The ***Mamika*** court went on to describe the method to be used to determine the "daily" rate: "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. This larger penalty acts as a disincentive to employers who are reluctant to pay wages in a timely manner, thus furthering the intent of the statutory scheme. ¶Thus, the critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days. ¶A somewhat similar method of calculation is used to compute overtime compensation...¶A more extensive discussion of penalty provisions appears in ***Nordling***

*v. Johnston* (Or.1955) 205 Or. 315, 283 P.2d 994, in which the Oregon Supreme Court construed a statute identical to section 203. The court held: 'We think the statute means what it says. The length of time that a man has worked for a particular employer and the amount he has earned, have no bearing on the amount of the penalty except as it may be necessary to consider these factors in order to determine the rate at which he was paid. The statute really requires no construction, for it plainly provides for the continuance of the workman's wages or compensation for a period not to exceed 30 days at the same rate at which he was being paid while he was working...Where, however, he does what is in the nature of piece work, as here, and is not paid a fixed daily or weekly wage but is paid on the basis of the quantity of work done, then, in order to apply the statute it becomes necessary to arrive at the rate per day by computation.'" (*Mamika, supra,* at 493-495, emphasis added)

We believe that the California courts, if faced with the question, would conclude that a commission or a bonus owed[1] to the employee would also be "in the nature of piece work" and must be included in the calculation. "The wages of the employee" would, of course, include all of the wages – the base rate, the piece rate, the commission and any bonus (Labor Code § 200). To eliminate any of the wages would not serve the public policy which the *Mamika* court concluded underlies the penalty, i.e., the imposition of the "larger penalty [which] acts as a disincentive to employers who are reluctant to pay wages in a timely manner."

2. When paying out accrued but unused vacation, do you calculate the amount using the base salary or total compensation (which includes guaranteed bonuses).

Labor Code § 227.3 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

[1]We would also point out that bonuses or commissions which are found due based on any theory of the law (e.g., common law contract doctrines such as "prevention" or "good faith and fair dealing") would also be included in the computation.

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, without having access to the vacation policy or employment contract upon which the policy is based, we can only offer general information on the issue: The employee is entitled to recover whatever wages were accrued as vacation wages.

The statute provides that the unused vacation is to be paid at the "final rate" of pay. That rate, of course, may be more or less than the rate which was in effect at the time that the vacation was accrued. However, it is the position of the DLSE that while an employer may, prospectively, change the rate of pay of the employee and, thus, change the amount due the employee at time of termination, any change in the "method of calculation" would require that the employees be paid for the time vested under the calculation method used at the time the vacation pay was accrued.

An example of the above description might involve a situation where workers had been paid an hourly rate plus a shift differential for working certain unpopular shifts. The employer policy had been to pay the vacation based on the full hourly rate (including the shift differential). The employer now wishes to change the vacation policy to provide that the vacation wage to be paid to an employee will be calculated on the hourly rate only, not including the shift differential. Labor Code § 227.3 would not preclude the employer from making this change prospectively since the law does not require any particular payment method for the vacation; but the vacation wages accrued by those employees which included the shift differential is accrued at that calculated amount and must be paid based on that calculation. Any vacation pay those employees accrued after the change in the policy would be subject to the new employer policy which does not use the shift differential in the calculation of the vacation wage.

If the contract of employment bases the vacation pay to be received by the employee on a calculation which includes the base salary and the bonuses, the employee would, of course, be entitled to recover unused vacation pay based on the base salary "at the final rate" and the bonus based on the rate at which the bonus was calculated.

If, on the other hand, the employer policy simply provides that the vacation paid to an employee is based on the base salary then, obviously, the unpaid vacation would be based on the same criteria calculated at the final rate of that base salary.

We also should point out that in applying the principles of equity and fairness, the Labor Commissioner will search out subterfuges which result in the final rate of pay being lower than the rate at which the vacation wages were accrued.

We hope this adequately addresses the issues 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