STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, *Of Counsel*

May 21, 2003

Ronald J. Klepetar
Jenkins & Gilchrist, LLP
12100 Wilshire Blvd., 15th Floor
Los Angeles, CA 90025

Re: **Labor Code § 233** (301)

Dear Mr. Klepetar:

Anne Stevason, Chief Counsel of the Division, has asked me to respond on behalf of the Division of Labor Standards Enforcement to your letter of March 6, 2003, seeking the Division's position on the following questions:

> Whether PTO constitutes sick leave for purposes of the Kin Care[1] entitlement statute and, if so, can an employer maintain an attendance policy regarding unscheduled absences?

In your letter you state that the PTO policy in question allows employees a certain number of PTO days of each year based on longevity. No distinction is made between vacation, sick time, or just wanting a day off and no explanation or reason is required.

As you may know, the DLSE has historically taken the position that a policy by which an employee accumulates time which may be taken off and which time is not conditioned upon the happening of an event or chain of events is subject to the provisions of Labor Code § 227.3. (See O.L. 1986.10.28, 1986.11.04, 1987.01.14-1, 1992.04.27) As the DLSE Enforcement Policies And Interpretation Manual[2] explains more fully at Section 15.1.12, *et seq.*, any employer policy which provides such time off may not be subject to divestment. The rationale for this enforcement approach is that it avoids subterfuge and provides equity and fairness. An employer

[1]For purposes of this letter, we assume you refer to Labor Code § 233 which requires employers to offer sick leave to employees to care for family members.

[2]Online at http://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm

policy which, on the other hand, provides for time off when specifically taken in conjunction with some event or chain of events (i.e., sickness, specified holidays, birthday, etc.) is not subject to the strictures of Labor Code § 227.3.

This enforcement policy is the result of a review of many inquiries received by DLSE in the years following the California Supreme court decision in the case of *Suastez v. Plastic Dress-Up* (1982) 31 Cal.3d 774. A number of proposed plans were reviewed which clearly were intended to provide an employee with the incentive of vacation pay without having the employer incur the obligation to accrue the time earned. Most of these plans referred to the time off in euphemistic terms - most commonly PTO or "paid time off" - but had the common attribute of incorporating what would otherwise be clearly denominated as vacation time into the PTO. Obviously, to allow employers to escape the obligation of vesting vacation time earned by simply lumping all time off (sick leave, holiday, birthdays, etc.) into one all-inclusive grouping would offer the employee neither equity nor fairness[3]. In addition, such plans would thwart the public policy underlying the statutory requirement which protects vacation time accrual from divestment.

In the fact situation you recite in your letter, the plan does not distinguish between employees requesting vacation, sick time, or just wanting a day off. Thus, as we understand, there is no quantitative measure for determining what percentage of the time taken off would be for vacation and what would be allocated to sick time. The employer's plan contains an "attendance policy" which requires some advance notice (i.e., one day) when scheduling a PTO day[4]. Such a requirement would have no impact on a vacation plan; but, of course, would make sick leave necessitated by a sudden attack of the flu a violation of the "attendance policy".

It is not entirely clear whether employees under the terms of the policy you propose are told that the PTO is designed to provide sick leave for the employees. You simply state that distinctions are not made between the various types of absences you list (which list includes "sick time"). In any event, an employee may logically conclude that since time off is afforded as needed, sick time

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[3]See Labor Code § 227.3 which requires the Labor Commissioner to "apply the principles of equity and fairness" in the resolution of any dispute with regard to vested vacation.

[4]The "attendance policy" would be violated in the event that an employee failed to give the one day of prior notice. This "attendance policy" is similar to many other such plans we have encountered lately, in that the employee is subject to discipline in the event that there are a certain number of "violations" of the attendance policy.

would be included since it is not specifically excluded.

As you may be aware, the Legislature appears to have enacted Labor Code § 234 in what could have been a response to this Division's former stated enforcement policy which held that the provisions of Labor Code § 233(a) would allow an employer to implement an "absence control policy[5]". The Legislature clearly stated that such a policy, notwithstanding any language in Labor Code § 233(a), was a *per se* violation of Labor Code § 233. Protection of workers sick leave to be utilized to care for family members obviously is an important policy concern for the California Legislature. As such, it is a public policy concern.

The "absence policy" you describe only leads to discipline in the event that the absence is unscheduled; and, of course, while many different types of absences may fall into this category, it is common knowledge that most absences resulting from one-day illnesses are, by their very nature, unscheduled. Thus, it appears, the policy you propose would have the result of limiting "sick time" absences in particular, though the policy may not specifically mention "sick time".

It is a well-defined rule of law in California that one who is subject to the provisions of remedial legislation may not evade the salutary objective of the statute by indirection. (*California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347) As the California Supreme Court has noted in discussing other remedial legislation: "The Legislature could not have intended to allow indirectly what it forbade directly." (*Henning v. IWC* (1988) 46 Cal.3d 1262, 1276)

If the mere appellation of a term was the method for determining the meaning of the term in the context it is found, the law would often be at odds with itself. Simply by denominating the promised time off as PTO which could be used for any purpose does not alter the fact that the PTO may also be used for sick leave. What's in a name?[6]. Clearly, calling what is paid time off because of illness by another name does not change the character of the time off - it remains sick leave.

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[5]In reaching this conclusion, DLSE relied upon the language in the statute which reads: "All conditions and restrictions placed by the employer upon the use by an employee of sick leave also shall apply to the use by an employee of sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner." That enforcement policy is, of course, rescinded by the adoption of Labor Code § 234.

[6]"What's in a name? That which we call a rose [B]y any other name would smell as sweet." (WM. SHAKESPEARE, Romeo and Juliet, *Act ii, Sc. 2.)*

It is the employer who is responsible for clearly defining the program. If the employer wished to denominate a certain amount of the time as sick leave which could only be taken in the event of illness, the PTO could be segregated so that not all of what is referred to as PTO would be subject to the strictures of Labor Code § 227.3 and the *Suastez* decision. By not denominating a given amount as sick leave (or some other leave which is tied to a particular event), it is the employer who chooses to have the whole of the amount subject to *Suastez* and Section 227.3.

We hasten to point out that it would be possible, of course, to have a program which offered paid time off which (1) was tied to a specific event or chain of events, or (2) specifically excluded the use of the time off for illness. Obviously, such a practice might make recruitment of employees more difficult, but it would put the employee on notice that the employer had no sick leave policy subject to Labor Code §§ 233 and 234.

As pointed out above, DLSE has addressed the question of the accrual of time off in the past. DLSE has always taken the position that "sick leave" was tied to a specific event - sickness - and, thus, was easily differentiated from vacation. However, the review of these policies often involves situations where time off is promised but the description of the time is unclear. For instance, in O.L. 1987.03.11, the agency reviewed a sick leave policy which provided for continuing accrual of sick leave, but, until at least 80 hours had been accrued, the time could not be used for any purpose except sick leave. After 80 hours had accrued in the sick leave program, the employer policy provided that up to 24 of those hours could be used for "personal compelling business" purposes. In the letter, the DLSE, following its established policy, concluded that it would consider all time in the sick leave policy to be exempt from the requirements of the *Suastez* doctrine; but that in the event of the termination of any employee with more than 80 hours of sick leave accumulated, the 24 hours (in excess of the 80 hours) which was not tied to a specific event or chain of events, would be considered vested as vacation time.

In the present situation, we are asked to look at a program which, unlike the situation in the 1987 letter, offers time off for any purpose. None of the time off is specifically tied to any event; thus the whole of the time is subject to the strictures of Labor Code § 227.3. In addition, since the time can also be used for purposes of sick leave, the time is also subject to the provisions of Labor Code § 233. Since there is no quantitative limit set by the employer on the amount of the time which may be used for sick leave, we must assume that all of the time could possibly be used for sick leave. Indeed, all of the time could be used as vacation, as well. But the employer responsible for

adopting the program has failed to clarify it with respect to the limits to be placed on the time off.

To summarize, a paid time off program (or any like program by whatever name) is reviewed for compliance with Labor Code § 227.3. Any paid time off promised which is not directly tied to an event or chain of events is considered to be subject to the provisions of Labor Code § 227.3. In addition, any plan or program which an employer offers promising time off without designating the time off either as vacation or designating a specific event or chain of events to which the time off is tied, is considered to be a form of a sick leave policy unless time off in the event of illness is specifically excluded in the policy or program.

Time off policies which directly or indirectly allow time off in the event of illness are sick leave policies and, to the extent the time may relate to family sick leave (or so-called Kin Care), may not be subject to an employer's attendance policy which may result in disciplinary action.

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
Anne Stevason, Chief Counsel
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