

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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March 23, 2016

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Patrick S. Kezer
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Dear Ms. Sletto and Mr. Kezer:

Re: Request for Opinion Letter – Rombauer Vineyards Quarterly Bonus Program

Your letters dated November 10 and 13, 2015 have been referred to me for response.

You seek a determination from the Labor Commissioner as to the legality of the Rombauer Quarterly Bonus Program. Two issues were addressed in your letters:

1. Whether the bonus can be paid out quarterly or whether it has to be computed in the pay period; and
2. Whether it is lawful for the company to require that the employee work the entire quarter to receive the bonus.

The Division of Labor Standards Enforcement Policies and Interpretations Manual defines a bonus in Section 2.5.5 as follows:

Bonus Defined. A bonus is money promised to an employee in addition to the monthly salary, hourly wage, commission or piece rate usually due as compensation. The word has been defined as: "An addition to salary or wages normally paid for extraordinary work. An inducement to employees to procure efficient and faithful service." *Duffy Bros. v. Bing & Bing*, 217 App.Div. 10, 215 N.Y.S. 755, 758 (193 9). Bonuses may be in the form of a gratuity where there is no promise for their payment; or they may be a contractually required payment where a promise is made that a bonus will be paid in return for a specific result (i.e., exceeding a minimum sales or piece quota). (See detailed discussion of Bonuses at Section 35 of this Manual)

The Labor Commissioner stated in an opinion letter dated December 23, 1986, that an incentive plan may be established based on quarterly goals and not violate Labor Code section 204. The December 23, 1986 Opinion Letter states that payment of an incentive bonus on a quarterly basis would not violate Labor Code section 204 and 210 provided that the base salary was paid in

Letter to Ms. Sletto and Mr. Kezer

March 23, 2016

Page 2

accordance with those sections. The letter concludes that the bonus must be paid on the next regular payday after it is calculated.

The program provides that the percentages are based on three goals. The first two goals are to sell a certain amount of cases of wines (focus red and white wines and as a second goal, a certain number of focus red wines). The third goal is to sign up new wine club members. The three categories are apportioned as follows:

Total wine sales: 50%

Red wine focus goal: 25%

Wine club sign-ups: 25%

The bonus program as understood from your letters and from the written policy is paid out on a percentage of wine and wine club memberships sold. This means that after the sales in the three categories are added up, the amount calculated for the quarter it is apportioned based on the number of hours worked by staff working on web sales and events and staff working in the tasting room. Presumably, all staff are engaged in sales.

The program provides that the employee percentage is calculated depending on the number of hours worked. The maximum amount that can be apportioned is \$11,011.85. However, the plan provides that provided some portion of the goal is met there will be a sliding scale payment. It appears that this means that there is a percentage payment made on all sales. The \$11,011.85 is just a measure for calculating the percentage of sales.

Mr. Kezer makes the point that the bonus plan is not a discretionary bonus but rather an earned bonus and therefore must be paid in each pay period because it is based on the number of cases of wine sold collectively by three different groups of staff and the number of hours each employee works to determine the percentage of the bonus due to each employee. It appears there is no dispute that there are regular hourly payments that exceed minimum wage, although this is not explicitly discussed in either letter. Even though the bonus is not a discretionary bonus, it is calculated based on quarterly goals thus, so long as at least minimum wage is paid in each pay period, the bonus may be paid quarterly.

The second question is whether the provision that provides "In the event you terminate, whether voluntary or involuntary, prior to the end of this quarter, then no bonuses, or portion thereof, shall be paid to you upon termination" is lawful. In this context, it is necessary to distinguish between an involuntary termination without cause, on the one hand, and a voluntary termination or involuntary termination with cause, on the other. In *Schacter v. Citigroup, Inc.*, (2009) 47 Cal.4th 610, the California Supreme Court quoted the Division of Labor Standards Enforcement Policies and Interpretations Manual with approval in explaining that if the sale has been made, termination of employment may not impede an employee's right to a pro rata percentage of incentive pay so long as the termination was not voluntary and so long as it was without cause. The high court quoted from the DLSE Enforcement Policies and Interpretations Manual to explain that the contract law principles which prohibit efforts by one party to a contract to prevent completion by the other party preclude such a forfeiture:

Letter to Ms. Sletto and Mr. Kezer

March 23, 2016

Page 3

“If the employee is discharged before completion of all of the terms of the bonus agreement, and there is not valid cause, based on conduct of the employee, for the discharge, the employee may be entitled to recover at least a pro-rata share of the promised bonus.” Quoting DLSE, Enforcement Policies and Interpretations Manual, *supra* § 35.5 and DLSE Opn. Letter No 1987.06.03 (June 3, 1987.) In the analogous context of commissions on sales, it has long been the rule that termination (whether voluntary or involuntary) does not necessarily impede an employee’s right to receive a commission where no other action is required on the part of the employee to complete the sale leading to the commission payment. (See *Willson v. Turner Resilient Floors* (1949) 89 Cal.App.2d 589, 201 P.2d 406.) This concept has been colorfully described as “”He who shakes the tree is the one to gather the fruit.”” (*E.A. Strout Western Realty Agency, Inc. v. Lewis* (1967) 255 Cal.App.2d 254, 259, 62 Cal.Rptr. 918, quoting *Sessions v. Pacific Improvement Co.* (1922) 57 Cal.App. 1, 18, 206 p. 653; see also DLSE Enforcement Policies and Interpretations Manual, *supra*, §34.6.)

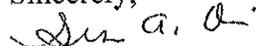
Schachter v. Citigroup, Inc. (2009) 47 Cal.4th 610, 622.

The court also explained that for bonus or incentive pay claims, when an employee is discharged without cause, contract law principles such as prevention of completion come into play to enable an employee to claim a pro rata share of what was earned under the bonus agreement.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

Thank you for your inquiry.

Sincerely,



Susan A. Dovi

Attorney for the Labor Commissioner