STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
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H. THOMAS CADELL, JR., *Chief Counsel*

February 22, 1993

Leroy D. Westmoreland, Esq.
Kmart Corporation
Legal Department
1184 North Citrus Ave.
Covina, CA 91722-5111

Re: **IWC §9**

Dear Mr. Westmoreland:

This is in response to your letter of December 15, 1992, wherein you inquire whether the deduction from an employee's wages for failure to return a Company-issued safety belt would be legal.

Initially, I believe you should look to the regulations adopted by Cal/OSHA regarding safety equipment and the obligation of the employer to furnish same.

Aside from the ramifications of the OSHA regulations, you raise the question of whether Section 9 of the Industrial Welfare Commission Wage Orders which, on its face, allows for a deduction is legally enforceable. Your research indicates that there is some doubt "although slight" that the section is not enforceable.

The Division of Labor Standards Enforcement is the agency mandated to enforce and interpret the Industrial Welfare Commission Orders. Since the provisions of Section 9 of the Orders is clear and unambiguous, the DLSE will continue to enforce the provisions. However, for some time now the Division has cautioned employers that such cases as *Barnhill v. Saunders* (1981) 125 Cal.App.3d 1, 177 Cal.Rptr. 803, and *CSEA v. State of California* (1988) 198 Cal.App.3d 374; 243 Cal.Rptr. 602 which cite *Kerr's Catering* (1962) 57 Cal.2d 319, 369 P.2d 20, 19 Cal.Rptr. 492, both for its holding and clear statement of public policy, demonstrate that the courts, if called upon, might not uphold Section 9 of the Orders.

As you point out, the IWC Orders provide that an employer has the option of utilizing the provisions of Labor Code §400 et seq. or, with prior written authorization, deducting the cost of an item from the employee's last check. In addition, the Statement of Basis adopted by the IWC in the 1980 Orders remains unchanged in regard to Section 9. In part, the IWC stated:

> "In some cases, the procedures for establishing funds in which to hold deposits in accord with Labor Code Sections 400-410, as provided in this section, are too cumbersome to be practical and an alternative is needed...The Commission found that employers were reasonable in their insistence that employees have an obligation to either return items belonging to the employer or pay for the cost of them."

Based upon this finding, the Commission took it upon itself to allow employers to withhold sums from the final pay of employees to pay for uniforms and equipment which the employer states has been given to the employee.

The case of *Barnhill v. Saunders* clearly holds that:

> "The policy underlying the state's wage exemption statutes is to insure that regardless of the debtor's improvidence, the debtor and his or her family will retain enough money to maintain a basic standard of living, so that the debtor may have a fair chance to remain a productive member of the community. Moreover, fundamental due process considerations underlie the prejudgment attachment exemption. Permitting [the employer] to reach [the employee's] wages by setoff would let [the employer] accomplish what neither it nor any other creditor could do be attachment and would defeat the legislative policy underlying that exemption. **We conclude that an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee."** (Emphasis added; citations omitted)

The *Barnhill* decision was decided subsequent to the promulgation of the 1980 Orders. Of course, the IWC did not change the language in either the Order or the Statement of Basis in the 1989 version of the Orders. However, the fact that IWC says that they saw no reason to change the language may be attributed to the fact that no one brought the question to their attention during their hearings.

The case of *People v. Industrial Welfare Commission*, Santa Cruz Superior Court No. 85071, rested on the same principles which are applicable in this matter. There the court struck down the second sentence of Section 8 of the Orders based on the language in *Kerr Catering* which holds that the wages due belong to the employee, not the employer. The Supreme Court in *Kerr* went on to note that "It is doubtful that an employer with an <u>unliquidated</u>

claim for damages against an employee would be permitted to withhold wages due the employee where such wages could not be reached by the employer as a judgment creditor." *Kerr Catering* (1962) 57 Cal.2d 319 at 325-326. The *Barnhill* court, relying on the law which came in the wake of *Sniddach v. Family Finance*, 395 U.S. 337 (1969), simply restated the *Kerr Catering* court notation in its 1962 decision which had held only that it was "doubtful" that such a withholding was allowed.

The language of Section 9(C) of the Orders simply flies in the face of the decisions in *Barnhill* and *Sniddach*. The language, indeed, flies in the face of *Kerr* insofar as it allows the employer to recover absent a "liquidated" claim and with no showing that the employee is guilty of gross (or culpable) negligence. There could very well be good reasons for the failure of the employee to return the uniform or the equipment; perhaps it was stolen from him or her[1] or was destroyed through no fault of the employee. As the Supreme Court in *Kerr Catering* said, an employer can not make the employee the guarantor of his business losses.

The language used by the IWC in the Statement of Basis to the effect that they considered the provisions of Labor Code §400 *et seq.*, to be "cumbersome" is an unfortunate choice of words. The Legislature set up the procedure and if it doesn't work because of cumbersome procedures the remedy is to go to the Legislature and have the law changed. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are void. *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347. However, the cumbersome procedure in Labor Code §400 et seq., is actually a formalized system designed to protect the interests of both the employer and the employee.[2] The *Kerr Catering* court addressed the question of the use of Labor Code Sections 400-410 and held that these sections:

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[1] We have to remember at this point that we are not talking about theft unless it can be shown that at the time the employer gave control of the uniform or equipment to the employee, the employee had the specific intent to steal the goods. I hardly think there are many instances where a waitress, for instance, would want to "steal" the uniform. However, there may be some cases where that is the case and if the employer can prove such intent in a criminal proceeding he would not be subject to waiting time penalties nor would the employee be able to recover the amount withheld. (See discussion, *infra*, regarding IWC Section 8)

[2] For instance, the bond money which is in a separate account is not subject to a money judgment except in an action between the employer and employee. This protects the money in that account in the event either the employer or the employee has serious financial difficulties. Such protections are not available under the IWC's "alternative" program.

> "[s]et out in detail the employee's bond law and the manner in which a cash bond may be extracted from an employee to cover merchandise entrusted to him. It provides a criminal penalty for the violation of its provisions. These[3] deductions from wages due appear to be in contravention of the spirit, if not the letter, of the Employee's Bond Law.
> ...
> "The use of the device of deductions creates the danger that the employer, because of his superior position, may defraud or coerce the employee by deducting improper amounts.
> ...
> "A further reason for legislative disapproval of deductions exists in the reliance of the employee on receiving his expected wage, whether it be computed upon the basis of a set minimum, a piece rate, or a commission. To subject that compensation to unanticipated or undetermined deductions is to impose a special hardship on the employee."

On the other hand, the Commission's "alternative" of allowing the employer to recover the sum he feels is due from the final pay of the employee leaves the employee with no alternative except to sue to recover the money he or she feels is due. Many times the amount is so small that bringing a claim to the Labor Commissioner and missing two or three days' work attempting to recover the money is not worth the hassle. Also, if the employer goes bankrupt or a corporate employer ceases doing business, the employee simply has no remedy.

Labor Code §224 provides the guidelines for deductions from wages:

> "The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law[4] or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or <u>other</u>

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[3] The deductions made by the employer in the *Kerr's Catering* case involved shortages from inventory which the employer had entrusted to the employee.

[4] The IWC Orders are regulations, not laws.

deductions not amounting to a rebate or deduction from the standard wage..."

As the Attorney General concluded in 1944, this language permits deductions only where the item is "for the benefit of the employee, not the employer". (3 Op.Atty.Genl. 178, 179) The recovery of the cost of the uniform or equipment would obviously be for the benefit of the employer and would not be permitted under the provisions of Section 224.

The remaining parts of Section 8 of the IWC Orders will allow a deduction only "if the cash shortage, breakage, or loss of equipment" is the result of a "dishonest or willful act, or by the gross negligence of the employee." The section at least gives some criteria which must be used to determine if the deduction is valid.

In summary, it is entirely possible that the provision of Section 9(C) of the Orders which allows an employer to recover the cost of uniforms or equipment given to the employee from the final pay of the employee is void as against public policy. The "spirit", if not the "letter" of the Employee Bond law requires that employers must use that vehicle to protect themselves against the occasional employee who has larceny in his heart.

The Division has notified the IWC of its position in regard to the validity of Section 9. The Division will continue to enforce the section absent a court ruling to the contrary. However, the employer community should be aware that the provisions of Section 9 are subject to review by the courts at any time and employer policies which utilize that statute may be found void.

I hope this adequately addresses the questions you raised in your letter.

Yours truly,

H. Thomas Cadell, Jr.

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c.c. Victoria Bradshaw