State of California
DIVISION OF LABOR STANDARDS ENFORCEMENT
MEMORANDUM

DATE: May 31, 2005

TO: DLSE Staff

FROM: Donna M. Dell
Labor Commissioner

SUBJECT: Removal of DLSE Opinion Letter No. 2002.08.30
Labor Commissioner's Guidance Memo (2005/2)

*****For DLSE Internal Use Only*****
(Rules of practice and procedure. Labor Code section 98.8)

As you are aware, pursuant to Executive Order S-2-03, the DLSE opinion letters and the Enforcement Policies and Interpretations Manual are currently under review to determine their legal force and effect and to ensure compliance with the requirements of the Administrative Procedures Act.

In accordance with that Order and after careful review, I have decided to remove Opinion Letter No. 2002.08.30 from former Labor Commissioner Arthur S. Lujan to Mr. Paul R. Lynd of Littler Mendelson regarding Salary Requirements for Exempt Employees, for the following reasons:

- **I can find no legal authority or sound business argument for the determination that a minimum of nine (9) months notice must be provided prior to employer-mandated usage of vacation or personal/paid time off (PTO). The statutory mandate in Labor Code section 227.3 that the Labor Commissioner "shall apply the principles of equity and fairness" in the resolution of any dispute with regard to vested vacation time, need only require *reasonable notice* which should be as far in advance as possible but generally no less than one full fiscal quarter or 90 days, whichever is greater.** (not 3 months)

- **It is well understood that an exempt employee cannot be subject to a partial day deduction of salary for hours not worked without disqualifying his or her exempt status. However, the reasoning which concludes that partial day use of vacation or PTO violates the salary basis test is clearly flawed because taking fully-paid vacation time off without any reduction in salary cannot be distinguished as a forfeiture of wages solely on the basis that it is taken in a partial day rather than a full day. This position has been reinforced repeatedly in both federal and state law by way of numerous statutes enacted in recent**

years providing for partial day use of paid leave for all employees in the event of family medical leave (29 USC 2606; Cal. Govt. Code 12545.2), for criminal victim's court proceedings (Cal. Labor Code 230.2) the Family School Partnership Act (Cal. Labor Code 230.8) or to attend to the illness of a child, parent, spouse or domestic partner pursuant to Cal. Labor Code 233.

Moreover, the California Supreme Court decision in *Suastez v. Plastic Dress-up Co.* (1982) 31 Cal.3d 774 interpreting Cal. Labor Code section 227.3 determined that "the right to a paid vacation . . . constitutes deferred wages for services rendered" and vests as the labor is rendered, concluding that "Once vested the right (to paid vacation) is protected from forfeiture" *id, at 784.* Under this opinion, actual receipt of the paid vacation earned *or* the deferred wage does not constitute forfeiture, thereby violating the salary basis test.

Since I cannot find a basis in the law supporting the determinations made in Opinion Letter 2002.08.30, nor were these determinations made pursuant to the regulatory process as provided for in the Administrative Procedures Act, this Opinion Letter has no legal force or effect and has been withdrawn from the DLSE website. The withdrawal of Opinion Letter 2002.08.30 also furthers the DLSE's stated intent to adopt the federal regulations dealing with the salary basis test where consistent with California law.

Accordingly, please remove Opinion Letter 2002.08.30 from all copies of the DLSE Enforcement Policies and Interpretations Manual.