#39 1/22/71

Memorandum 71-8

Subject: Study 39 - Attachment, Garnishment, Execution (Discharge From Employment)

Attached are two copies of a revised recommendation relating to discharge from employment for garnishment of wages. This recommendation is presented for approval for printing and submission to the Legislature. Please mark your suggested revisions on one copy and return it to the staff at the February meeting.

Yesterday we sent out this tentative recommendation to approximately 150 persons and organizations for comment. We will bring any comments we receive to your attention at the February meeting.

We have omitted all discussion from the revised recommendation of California obtaining an exemption from federal restrictions on garnishment. The discussion is not needed since we are no longer proposing a criminal penalty and attempting to justify the necessity of the penalty.

We have added a new Section--Section 2929--to state the restriction on discharge for garnishment. We have included several clarifying provisions in this new section that were not included in the prior draft. In addition, we have included a provision indicating that the new section is intended to aid in the enforcement of the prohibition against discharge provided in the federal act. We believe that the inclusion of this provision will make it more likely that the state interpretations of the prohibition will conform to the federal interpretations. In the Comment to Section 2929, we have quoted at length from a Wage and Hour Division publication which gives general information as to the meaning of the prohibition against discharge. We believe that the inclusion of this material

in the Comment will be helpful in construing the section, but we have included the information in a form that does not make it binding in construing the statute. The Wage and Hour Division publication from which the material is quoted is attached to Memorandum 71-6.

Respectfully submitted,

John H. DeMoully
Executive Secretary

#39 Revised January 20, 1971

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Discharge From Employment

March 1971

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE: This is a tentative recommendation and is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. For the most part, the Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE IN THE HANDS OF THE COMMISSION NOT LATER THAN FEBRUARY 1, 1971.

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

relating to

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Discharge From Employment

On July 1, 1970, Title III of the Federal Consumer Credit Protection Act of 1968 (15 U.S.C. §§ 1601-1677)--the Truth in Lending Act--went into effect throughout the United States imposing restrictions on the amounts creditors could garnish from debtor's earnings and prohibiting discharge from employment under certain circumstances.[1] The 1970 California Legislature attempted to conform the California law to the federal restrictions on the amount of earnings which a creditor can garnish[2] but did not attempt to conform the California provisions restricting discharge from employment because of garnishment[3] to the federal act.

The federal act provides that any employer subject to the act who willfully discharges an employee because his wages have been subjected to garnishment for a single indebtedness may be fined up to $1,000, or imprisoned for not more than one year, or both.[4] This criminal sanction is the only penalty provided for violation of the discharge restriction.

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1. See 15 U.S.C. §§ 1671-1677.

2. Cal. Stats. 1970, Ch. 1523. The Commission is reviewing the California statutes relating to attachment, garnishment, and exemptions from execution with a view to recommending the enactment of a comprehensive revision of this body of law at a future session of the Legislature.

3. Labor Code §§ 2922, 2924. See also Labor Code § 96.

4. 15 U.S.C. § 1674.

The California Legislature sought in 1969 to protect an employee from summary discharge because of garnishment for a single indebtedness by amending Labor Code Sections 2922 and 2924 to provide: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness, prior to a final order or judgment of a court."[5] This prohibition is the same as the federal Consumer Credit Protection Act except for the emphasized phrase. However, that phrase appears to limit the prohibition against discharge solely to discharge for a prejudgment attachment of earnings.[6] Also, under California law, an employer who violates the prohibition against discharge is liable for the wages of a wrongfully discharged employee,[7] the period of liability ending when the employee is reinstated or at the end of 30 days following discharge, whichever occurs first. Unlike the federal act, no criminal penalty is provided.

The 1969 California legislation also amended Labor Code Section 96[8] to permit the Division of Labor Law Enforcement to take an assignment of the discharged employee's wage claim.[9] An employee has 30 days following the

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5. Cal. Stats. 1969, Ch. 1529 (emphasis added).

6. See Review of Selected 1969 Code Legislation 146-148 (Cal. Cont. Ed. Bar 1969).

7. The prohibition applies to employments at will (Labor Code § 2922) as well as for a specified term (Labor Code § 2924).

8. Labor Code § 96(k).

9. In cases of discharge from employments terminable at will, Labor Code Section 2922 provides that the commissioner "shall take assignment of wage claims." By contrast, Section 2924 provides that he "may take assignment of wage claims" filed by employees discharged from specified-term employments. For further discussion, see Review of Selected 1969 Code Legislation 147 (Cal. Cont. Ed. Bar 1969). The Commission believes that the Labor Commissioner should have discretion in all cases whether he will take an assignment of a wage claim and the recommended legislation so provides.

wrongful discharge from employment to notify the employer of his intent to make the claim and 60 days after the discharge to file the claim with the Labor Commissioner.[10] This statutory requirement apparently is intended to prescribe a mandatory time limit on claims the employee may but is not required to file.

The 1969 California legislation appears subsequently to have been rendered meaningless: first, by the decision of the California Supreme Court in McCallop v. Carberry,[11] and, then, by the enactment in 1970 of Code of Civil Procedure Section 690.6,[12] both of which bar prejudgment garnishment of earnings in California. Since there is now no prejudgment wage garnishment, there can be no occasion for a discharge for such garnishment.

On July 1, 1970, the broader federal provision which bars discharge for postjudgment levies against earnings for any one indebtedness became applicable in California. Conforming the California statutory prohibition to the federal prohibition--by omitting the phrase "prior to a final order or judgment of a court" which now appears in Labor Code Sections 96, 2922, and 2924--is recommended so that the California statutes will state the prohibition as it has in fact applied to California employers since July 1, 1970. This change would benefit employees by making applicable the California civil remedy[13] for wrongful discharge--a more effective method of securing

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10. Labor Code §§ 2922, 2924.

11. 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

12. Cal. Stats. 1970, Ch. 1523.

13. The Commission has reviewed the "not more than 30 days' wages" penalty now provided in Labor Code Sections 2922 and 2924 and has concluded that it is a fair and desirable provision.

compliance than the criminal sanction provided by the federal law. The change would benefit employers also to the extent that the provision of a reasonable alternative means of enforcement diminishes the possibility of a criminal prosecution for wrongful discharge under the federal law.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 96, 2922, and 2924 of, and to add Section 2929 to, the Labor Code, relating to termination of employment.

The people of the State of California do enact as follows:

Section 1. Section 96 of the Labor Code is amended to read:

96. The Labor Commissioner and his deputies and representatives authorized by him in writing may take assignments of:

(a) Wage claims and incidental expense accounts and advances.

(b) Mechanics' and other liens of employees.

(c) Claims based on "stop orders" for wages and on bonds for labor.

(d) Claims for damages for misrepresentations of conditions of employment.

(e) Claims for unreturned bond money of employees.

(f) Claims for penalties for nonpayment of wages.

(g) Claims for the return of workmen's tools in the illegal possession of another person.

(h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.

(i) Awards for workmen's compensation benefits in which the Workmen's Compensation Appeals Board has found that the employer has failed to secure payment of compensation and where the award remains unpaid more than 10 days after having become final.

(j) Claims for loss of wages as the result of discharge from employment for ~~one~~ the garnishment of wages ~~prior to a final order or judgment of a court~~ for any one indebtedness .

Comment. See the Comment to Section 2929.

Sec. 2. Section 2922 of the Labor Code is amended to read:

2922. An employment, having no specified term, may be terminated at the will of either party on notice to the other. ~~No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness, prior to a final order or judgment of a court. The wages of an individual whose employment has been so terminated shall continue until reinstatement if such termination is found to be in violation of this section; but such wages shall not continue for more than 30 days. The employee shall give notice to his employer of his intention to make such a wage claim within 30 days after being laid off or discharged and shall file a wage claim with the Labor Commissioner within 60 days of being laid off or discharged. The Labor Commissioner shall take assignment of wage claims under this section as provided for in Section 96.~~ Employment for a specified term means an employment for a period greater than one month.

Comment. See the Comment to Section 2929.

Sec. 3. Section 2924 of the Labor Code is amended to read:

2924. An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it. ~~No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for one indebtedness, prior to a final order or judgment of a court. The wages of an individual whose employment has been so terminated shall continue until reinstatement if such termination is found to be in violation of this section, but such wages shall not continue for more than 30 days. The employee shall give notice to his employer of his intention to make such a wage claim within 30 days after being laid off or discharged and shall file a wage claim with the Labor Commissioner within 60 days of being laid off or discharged. The Labor Commissioner may take assignment of wage claims under this section as provided for in Section 96.~~

Comment. See the Comment to Section 2929.

Sec. 4. Section 2929 is added to the Labor Code, to read:

2929. (a) As used in this section:

(1) "Earnings" means compensation paid or payable for personal services performed by an employee, whether denominated as wages, salary, commission, bonus, or otherwise.

(2) "Garnishment" means any judicial procedure through which the earnings of an employee are required to be withheld for payment of any debt.

(b) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness, whether or not the employee is employed for a specified term.

(c) The wages of an employee who is discharged in violation of this section shall continue until he is reinstated or until 30 days following his discharge, whichever occurs first. The employee shall give notice to his employer of his intention to make a wage claim under this section within 30 days after being discharged and shall file a wage claim with the Labor Commissioner within 60 days after being discharged.

(d) The Labor Commissioner may take assignment of wage claims under this section as provided for in Section 96.

(e) Nothing in this section affects any other rights the employee may have against his employer.

(f) This section is intended to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided in the Consumer Credit Protection Act of 1968 (15 U.S.C. §§ 1671-1677) by providing a more appropriate penalty for violation of the prohibition.

Comment. Section 2929 provides a civil penalty to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided by the federal Consumer Credit Protection Act of 1968. See 15 U.S.C. § 1674. The federal act provides a criminal sanction as the only penalty for violation of the prohibition.

The civil penalty under Section 2929 benefits employees by providing a more effective method of securing compliance than the criminal sanction provided by the federal law. The availability of a civil penalty should benefit employers also to the extent that the provision of a reasonable alternative means of enforcement diminishes the possibility of a criminal prosecution under the federal law. See Recommendation of the California Law Revision Commission Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment (March 1971).

Since Section 2929 is intended to aid in enforcement of the federal prohibition against discharge for garnishment, the interpretations given to the federal act will be persuasive in interpreting Section 2929. The Wage and Hour Division of the U.S. Department of Labor has published the following interpretative information in "The Federal Wage-Garnishment Law," W.H. Publication No. 1309 (October 1970):

> PROTECTION AGAINST DISCHARGE
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> The Federal law prohibits an employer from discharging any employee because his earnings have been subject to garnishment for any one indebtedness. The term "one indebtedness" refers to a single debt, regardless of the number of levies made or the number of proceedings brought for its collection. A distinction is thus made between a single debt and the garnishment proceedings brought to collect it.

If several creditors combine their debts in a single garnishment action, the joint amount is considered as "one indebtedness". In the same vein, if a creditor joins several debts in a court action and obtains a judgment and writ of garnishment, the judgment would be considered a single indebtedness for purposes of this law. Also, the protection against discharge is renewed with each employment, since the new employer has not been a garnishee with respect to that employee.

LIMITS OF DISCHARGE PROVISION

The restriction on discharge applies to all garnishments as that term is defined in the law. Accordingly, if a tax debt results in a court proceeding through which the employee's earnings are required to be withheld, a discharge for such a first-time garnishment would be in violation of the law. The same would be true of a court order for the withholding of wages for child support or alimony. Also, since the discharge provision is a protection against "firing," a suspension for an indefinite period or of such length that the employee's return to duty is unlikely may well be considered as tantamount to firing and thus within the term discharge as used in the law.

Some employers have a rule that the employee will be given warnings for the first two garnishments and will be discharged for the third garnishment in a year. Where at least two of the actions relate to separate debts, discharge would not be prohibited by the law since the warning and discharge would be based on garnishment for more than one indebtedness.

In some cases employers set up plans which prescribe disciplinary actions for violations of company standards of conduct, with discharge if for example the employee violates three of the standards in a year. One of the actions considered as a violation is "garnishment of wages". If only one of these violations relates to garnishment, discharge would be prohibited by the law since the discharge would result from garnishment for only one indebtedness. In other words, regardless of the employer's disciplinary plan, no discharge may be based either wholly or in part on a first time garnishment.

The law does not prohibit discharge if there are garnishment proceedings pursuant to a second debt. However, as in the case of the limitations on the amount that may be garnished, the law does not affect or exempt any person from complying with a State law that prohibits discharge because an employee's earnings have been subjected to garnishment for more than one indebtedness.

"SUBJECTED TO GARNISHMENT"

An individual's earnings are "subjected to garnishment" for purposes of this law when the garnishee (employer) is bound to withhold earnings and would be liable to the judgment creditor if he disregards the court order.

The law does not expressly provide any time limitation between a first and second garnishment. Where a considerable time has elapsed between garnishments, it may be that the employee is actually being discharged for the current indebtedness. The first indebtedness may no longer be a material consideration in the discharge. Determinations in such cases will be made on the basis of all the facts in the situation.

Subdivision (a). Subdivision (a) defines "earnings" and "garnishment" in conformity with Section 302 of the Consumer Credit Protection Act. 15 U.S.C. § 1672.

Subdivision (b). Subdivision (b), which prohibits an employer from discharging any employee because his earnings have been subject to garnishment for any one indebtedness, adopts the exact language of Section 304 of the federal statute and adds the last clause making clear that the prohibition applies "whether or not the employee is employed for a specified term." 15 U.S.C. § 1674. Formerly, a somewhat similar prohibition was found in Section 2922 (employment having no specified term) and Section 2924 (employment for a specified term). See Recommendation of the California Law Revision Commission Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment (March 1971).

Subdivision (c). Subdivision (c) continues without substantive change the civil penalty and notice requirements formerly found in Sections 2922 and 2924. The term "wages," which formerly was used in Sections 2922 and 2924, is retained so that subdivision (c) will be consistent with the Labor Code provisions dealing with compensation of employees. E.g., Labor Code § 200 (defining "wages"); see also Labor Code § 96 (assignment of wage claims).

Subdivision (d). Subdivision (d) continues a provision formerly found in Sections 2922 and 2924.

Subdivision (e). Subdivision (e) makes clear that Section 2929 has no effect on any other rights the employee may have. For example, he may have rights under his contract of employment, and these are not affected by Section 2929.