

#39.30

1/6/72

Second Supplement to Memorandum 72-2

Subject: Study 39.30 - Attachment, Garnishment, Execution (Employees' Earnings Protection Law)

Attached to this memorandum are two copies of a letter to the U. S. Department of Labor requesting that the department examine our proposed legislation to ascertain whether it would satisfy the requirements for an exemption from the provisions of Section 303(a) of the CCPA. The letter includes an analysis of our proposed legislation.

Please read the attached material with care. Mark your suggested revisions on one copy and return the copy to the staff at the meeting. We will revise the attached material after the meeting to make any changes needed as a result of Commission action at the meeting.

We are hopeful that we can get a prompt response from the federal authorities (we request a response in 60 days) since we will need time to consider any problem areas and make necessary amendments to the bill before it is enacted.

Respectfully submitted,

John H. DeMouly
Executive Secretary

Second Supplement to Memorandum 72-2

EXHIBIT I

Mr. Horace E. Menasco
Office of the Administrator
U.S. Department of Labor
Workplace Standards Administration
Washington, D.C. 20210

Dear Mr. Menasco:

Re: California Exemption From Enforcement of Provisions of Section 303(a)
of CCPA

The California Law Revision Commission, a permanent California state agency, has been directed by the California Legislature to make a comprehensive study leading to legislative revision of the California law relating to attachment, garnishment, and execution. As a part of this study, the Commission has prepared a recommendation relating to wage garnishment and related matters for the 1972 session of the California Legislature. Three copies of the Commission's recommendation are enclosed.

In January 1971, I advised your department that the Commission was undertaking a study of wage garnishment and related matters and raised a number of questions concerning the coverage of the CCPA that were causing the Commission concern. Mr. Ben P. Robertson, Deputy Administrator, Wage and Hour Division, responded to my letter on November 22, 1971. He provided useful background information and indicated that your division would be pleased to examine our proposed legislation to ascertain whether it would satisfy the requirements for an exemption from the provisions of Section 303(a) of the CCPA.

Significant developments have occurred since my letter of January 1971. Working with a special committee of the California State Bar, representatives

of creditor organizations, legal aid and poverty lawyers, and others (including our consultants, Professor William D. Warren, UCLA Law School, and Professor Stefan A. Riesenfeld, Boalt Hall, UC Berkeley), the Commission has drafted a comprehensive statute dealing with wage garnishment and related matters.

Senate Bill No. has been introduced to effectuate the Commission's recommendation. This bill conforms exactly to the legislation contained in the enclosed recommendation. The Commission expects that this bill will be heard by the Senate Judiciary Committee within the next 40 days, and we have every reason to expect that the bill will be enacted as law by the 1972 legislative session. There is considerable support for the bill from representatives of all interested groups. Creditors' representatives object to the restrictions on the amount of earnings that can be withheld and to the liberal bank account exemption. Legal aid and poverty lawyers have urged the Commission to provide more stringent restrictions on the amount of earnings that can be garnished. The Commission anticipates that these areas of controversy will be worked out during the passage of the bill through the Legislature.

There is attached to this letter an analysis of the Commission's recommended legislation. This analysis is intended to alert you to the areas where questions may arise as to whether the recommended legislation meets federal requirements. The Commission believes that its recommendation will provide substantially greater protection to debtors than the federal statute, especially low income debtors, will minimize the burden of compliance for employers, and will provide creditors with an efficient, inexpensive system for collection of their judgments.

It would, we believe, be unfortunate if a state is required to adopt precisely the same system as the federal statute in order to obtain an exemption from federal enforcement. Accordingly, we hope that you can informally approve the recommended legislation even though there might conceivably be cases--in high income brackets--where the statute would provide slightly less protection than Section 303(a) of the federal statute.

It is important that we receive any revisions in the recommended legislation which you believe are necessary within 60 days. The attached analysis should be useful in your appraisal of the recommended legislation and will, we hope, make it possible to meet this schedule. Should you have any questions concerning the recommended legislation, please write or call me at Stanford. The address and telephone number are on the letterhead.

We will appreciate your cooperation in this matter.

Sincerely,

John H. DeMouilly
Executive Secretary

ANALYSIS OF RECOMMENDED LEGISLATION OF CALIFORNIA

LAW REVISION COMMISSION

FORM OF RECOMMENDATION

The California Law Revision Commission's proposed statute is contained in its recommendation. Comments to various sections of the proposed statute are included in the recommendation. The publishers of the California Annotated Statutes print these comments under the sections in the published statutes. The California courts have held that the Law Revision Commission's comments are entitled to substantial weight in construing the statutes. E.g., Van Arsdale v. Hollinger, 68 Cal.2d 245, 249, 437 P.2d 508, , 66 Cal. Rptr. 20, (1968). Accordingly, it is suggested that the comments to the recommended legislation be carefully reviewed.

"EARNINGS" COVERED BY RECOMMENDED LEGISLATION

Earnings of "employees." The recommended legislation includes a comprehensive procedure governing garnishment of earnings of "employees." The definition of "earnings" for the purpose of this portion of the statute follows the federal definition with two exceptions: First, the definition is limited to earnings of employees; the federal definition contains no similar express limitation. Second, periodic payments pursuant to a pension or retirement program are not included. See Section 723.011(a), page 40 of recommendation.

Independent contractors. We do not know whether the federal statute is intended to or will be construed to cover amounts owed to independent contractors. Our wage garnishment procedure is not designed to deal with such amounts. The recommended legislation does contain a separate provision that provides protection to some independent contractors. See Section 690.6 (pages 27-29 of recommendation).

The difficult problem with respect to independent contractors is, of course, that there often is no pay period; a substantial lump sum amount may fall due on a particular date under a contract for services rendered over a substantial period of time. Moreover, the amount payable on the contract may reflect services rendered by employees of the independent contractor and may include cost of materials and supplies. The matter of providing a procedure for garnishment of amounts payable to independent contractors and appropriate protections to them is under study by the Commission. We hope that this matter will not create any problems in obtaining a federal exemption from Section 303(a) of the CCPA.

Periodic payments from pension or retirement program. Periodic payments pursuant to a pension or retirement program are covered by Section 690.18 (pages 32-34) of the recommendation). Generally speaking, these payments are completely exempt from garnishment under various California statutes. Nevertheless, in the event that there may be instances where the payments are not completely exempt, the recommended legislation contains an exemption that will provide the same protection against garnishment as is afforded earnings of an employee. (See also discussion on page 5, infra, concerning "paid" retirement benefits.)

"Tips" and other earnings. The recommended legislation contains a provision whereby a creditor can obtain a garnishment order that takes into account "tips" and multiple sources of earnings for the purpose of computing the amount that may be withheld from earnings. See Section 723.106 (page 62 of the recommended legislation).

The State Administrator (State Director of Industrial Relations) is authorized to make regulations necessary for the administration of the statute. These regulations will define what constitutes earnings (thus

permitting continuing conformance with federal regulations and interpretations) and will prescribe such matters as the pay period or periods to which such forms of compensation as retroactive pay increases are to be allocated. See Section 723.151 (page 70 of recommendation).

"PAID" EARNINGS

Generally. Your WH Publication No. 132⁴ states that "garnishment" refers to "a court proceeding through which a creditor seeks to reach an employee's earnings before they are paid to him, so that they may be applied to the satisfaction of a claim against the employee." (Emphasis added.) There appears to be nothing inconsistent with this statement and your opinion that applied the federal garnishment restrictions to protect a bank account of an employee into which his net earnings were deposited by a bank acting as the employer's payroll agent. (As to the exemption for bank accounts, see discussion on page 13, infra.) Except for this exceptional type of case, it does not appear that the federal statute would apply to protect "paid" earnings--earnings that have been paid to the employee. Nevertheless, it is the view of the Commission that an employee is not provided adequate protection if the statute restricts the amount of "unpaid" earnings that may be garnished but permits all of the same earnings to be subject to levy as soon as they pass into the hands of the employee. The difficulty, of course, with protecting "paid" earnings is that normally cash in the hands of the employee may or may not have its source in his earnings and, if it is not readily identifiable as "earnings," a claim for exemption is necessary. In such a situation, this procedural burden is essential if we are to extend and effectuate the restrictions on the amounts that may be garnished rather than to defeat the restrictions.

Paid earnings of an employee. The legislation recommended by the Commission provides complete protection to earnings from prejudgment attachment, whether earnings are payable or paid. See Section 690.5-1/2(b), (c), and (d) (pages 23-27 of recommendation). In addition, where the creditor has obtained a judgment, the amount of "paid" earnings that can be taken from the employee under a levy of execution is limited by subdivisions (e) and (f) of Section 690.5-1/2. As to unpaid earnings, the recommended legislation contains no such 30-day similar limit. As to paid earnings, however, some limit seems desirable. Otherwise, a debtor might be permitted to exempt a substantial amount--say \$10,000 found in his safe deposit box--by showing it was earnings saved over a period of years. To provide an exemption for "paid" earnings that covers earnings for an unlimited period would seldom, if ever, benefit low income wage earners but could provide a means by which a wealthy individual could avoid payment of his debts. In addition, practical problems are presented by a broader exemption. These include determining the pay periods involved, determining how to apply the exemption where the employee has spent a portion of the earnings, developing first-in, first-out or similar rules to determine the pay periods to which expended earnings should be allocated, and the like.

When the Commission developed the exemption for "paid" earnings, it had before it a letter from the U.S. Department of Labor indicating that the federal restrictions on garnishment do not apply after the employee has the earnings in his hands. We believe that the protection afforded by the recommended legislation to "paid" earnings is in excess of federal requirements and should satisfy federal requirements even if the letter referred to and WH Publication No. 1324 no longer reflect the federal interpretation of the CCPA.

It should also be noted that an additional exemption is provided for "paid" earnings in subdivision (f) of Section 690.5-1/2. This permits the court to exempt all of the "paid" earnings described in subdivision (e) of that section if the additional amount is essential for the support of the debtor or his family.

Payments from pension or retirement fund. It should be noted that the Commission plans to provide an exemption for "paid" payments pursuant to a pension or retirement program that is comparable to the exemption provided for "paid" earnings of employees described above.

Paid earnings of independent contractors. Amounts paid to independent contractors may be entitled to an exemption on a tracing theory under Section 690.6 (pages 27-29 of recommendation).

RESTRICTIONS ON AMOUNT THAT MAY BE WITHHELD FROM EARNINGS

The proposed restrictions on the amount that may be withheld from earnings pursuant to a wage garnishment are discussed in some detail on pages 6-11 of the recommendation. See also Sections 723.050 and 723.051 (pages 54-57 of recommendation). The comparison table on page 9 of the recommendation compares the amounts to be withheld under the proposed statute with the amounts withheld under federal statute.

It is proposed to provide employers with withholding tables based on gross earnings. These tables will be prepared by the State Administrator taking into consideration the deductions made in computing "disposable earnings" under federal law. The only deduction not considered in preparing the tables is the deduction made for employees under a public retirement system.

The tables will provide substantially greater protection to debtors than the federal law, especially in low income brackets. A significant

improvement is the elimination of the feature of the federal statute that permits withholding of 100 percent of the disposable earnings between \$48 and \$64. The Commission believes that its proposed restriction on withholding will always result in greater protection than provided under federal law. Also, any changes in the federal minimum wage, state or federal withholding tax amounts, social security, and the like will automatically be recognized and new tables prepared by the Administrator.

In addition to the automatic exemption provided by the withholding tables, the debtor is entitled to a claimed exemption for any additional amounts of earnings essential for family support. See Section 723.051 (page 56 of recommendation).

SUPPORT AND ALIMONY PAYMENTS

The one area where the recommended legislation differs significantly from the interpretation you give the federal statute is in its treatment of support and alimony payments. The federal statute treats amounts withheld by an employer pursuant to court order from an employee's earnings the same as amounts withheld by any other creditor. The Commission's recommended legislation treats such amounts analogous to "amounts required by law to be withheld."

The Commission believes that its recommended scheme is a more equitable one than the federal scheme for the reasons stated below.

Treatment of support obligations where judgment debtor is divorced or separated from former spouse. A judgment debtor who is obligated to support a former spouse or children by a former marriage or who is separated from his spouse and family usually has a greater support obligation since he is maintaining two households. Nevertheless, the federal statute does not

recognize this greater support obligation unless and until the judgment debtor fails to make support payments when due, is sued and a judgment against him granted, and the judgment is enforced by a wage garnishment order. If the normal method is used to enforce a court order of support--i.e., the delinquent support obligor is threatened with contempt of court if he fails to comply with the order to provide support--or if the delinquent support payments are paid by resorting to other assets of the judgment debtor, no recognition is given to the support obligation under the federal statute. On the other hand, WH Publication No. 1324 states that, in the event a support obligation is enforced by a wage garnishment order, the amount withheld from earnings pursuant to the support order is considered a garnishment for the purpose of applying the 25 percent limitation; and, as a practical matter, this will ordinarily preclude any other creditor from using a wage garnishment to collect his judgment.

We are unaware of any state that has provided a means whereby earnings can be garnished on a continuing basis for the payment of support obligations as they become due. The recommended legislation (discussed at pages 11-12 and 49-50 of the recommendation) provides such a system for continuous withholding by employers for support on a current basis. The amount withheld by the employer pursuant to the continuing withholding order would be deducted from gross earnings in determining whether any garnishment by an ordinary creditor would be permitted. Garnishment of earnings by the ordinary creditor would be permitted only if the debtor has sufficient "gross earnings" after such deduction to permit withholding of additional earnings under the withholding tables.

Illustrations of difference in results under federal and state statute.

The following are illustrations of the difference in results that would be reached under the federal and proposed state statute.

Illustration 1

Facts: Employee has gross earnings of \$110 per week. He is obligated under a support order to pay his former spouse and children by his former marriage \$40 per week. He has remarried and has two children by his second marriage. He makes the payments for support voluntarily and his earnings are now garnished by an ordinary creditor.

Result: Under the federal restrictions, the disposable earnings would be approximately \$97 and approximately \$24 would be withheld from his earnings each week pursuant to the garnishment.

Under the proposed state statute, \$10 would be withheld each week pursuant to the garnishment.

Illustration 2

Facts: Same facts as in Illustration 1 except that employee's earnings have been garnished by first wife for payment of a judgment for \$40 for past-due support.

Result: Under the federal restrictions, nothing would be withheld from his earnings pursuant to a second garnishment.

Under the proposed state statute, the \$40 support garnishment would be deducted from \$110 earnings, leaving \$70, and nothing would be withheld from his earnings pursuant to a second garnishment.

Illustration 3

Facts: Same facts as in Illustration 1 except that employee has made a wage assignment for a support obligation to first wife and children.

Result: Under federal law, same result as in Illustration 1. \$24 would be withheld from his earnings each week if his earnings are garnished by second creditor.

Under recommended statute, special provision is made for converting "wage assignment" into a "continuing earnings withholding order for support" and same result as in Illustration 2, nothing would be withheld on second garnishment by another creditor.

Illustration 4

Facts: Employee's gross earnings are \$200 per week. He is obligated under a support order to pay his former spouse and children by his former marriage \$75 per week. He is remarried and has two children by his second marriage. He makes the payments for support voluntarily and his earnings are now garnished by a second creditor.

Result: Under the federal restrictions, the disposable earnings would be approximately \$164 and approximately \$41 would be withheld from his earnings each week pursuant to the garnishment.

Under the proposed state statute, \$25 would be withheld from his earnings each week pursuant to the garnishment.

Illustration 5

Facts: Same as in Illustration 1 except that the employee's earnings have been garnished by first wife for payment of \$75 per week to enforce support order.

Result: Under the federal restrictions, nothing would be withheld from his earnings pursuant to a second garnishment.

Under the proposed state statute, the \$75 for support would be deducted from the \$200 gross earnings, leaving revised gross earnings of \$125 and approximately \$13 would be withheld pursuant to the second garnishment.

Illustration 6

Facts: Same facts as in Illustration 1 except that employee has made a wage assignment for support obligation to first wife and children.

Result: Under federal law, same result as in Illustration 4. \$41 would be withheld from his earnings each week if his earnings were garnished by second creditor.

Under the proposed state statute, special provision is made for converting "wage assignment" into a "continuing earnings withholding order for support" and only \$13 would be withheld from his earnings on a second garnishment.

Illustration 7

Facts: Employee has disposable earnings of \$100,000 a year. He is obligated to pay \$25,000 a year in support, a prorata portion for each of his pay periods. His former wife garnishes his earnings to enforce payment of delinquent support.

Result: Since the garnishment for support is equal to or exceeds 25 percent of disposable earnings, nothing can be obtained by an ordinary creditor who garnishes earnings, even though the judgment debtor has \$75,000 of disposable earnings.

Under the proposed state statute, the amount withheld pursuant to the support garnishment would be subtracted from gross earnings, and the amount that would be withheld pursuant to the second garnishment would be determined by the remaining gross earnings.

Policy question presented. The Commission believes that the overall effect of its recommendation not only is to provide adequate protection under more circumstances than the federal statute, but also to compel persons who have support obligations to keep those obligations current by providing a procedure to accomplish this result. Since there is no existing wage garnishment procedure for support as it comes due, the employee who is pressed by his creditors is strongly motivated to become delinquent in support payments because garnishment of earnings to pay a judgment for past due support will almost always preclude garnishment by an ordinary creditor if it is assumed, as is usually the rule, that the support obligation will be given a priority over other debts.

The Commission proposes to establish a procedure to permit a continuing court order directing withholding by the employer for a support obligation for a current basis. It is greatly in the public interest that alimony and support obligations be met when due and that the courts, which are already congested, not be burdened with wage garnishments as a means of obtaining payment of judgments for past due support.

California has already taken steps to provide an efficient system whereby deductions can be made by the employer from earnings so that support payments are kept current. Existing California statutes provide that, under certain circumstances, the court can require the support obligor to execute a "continuing wage assignment" for support. This assures that, each month, the support payment will be withheld from the employee's earnings and be paid to the person for whom it is intended. It is assumed that no recognition is provided these payments under the federal statute since they are made pursuant to a "voluntary" wage assignment. (As far as the employer is concerned, he has no knowledge of whether the assignment is completely voluntary or was made at the urging of a court.)

The Commission would prefer to use the same earnings withholding order procedure for all court orders to employers to withhold earnings so that employers are not required to cope with several different procedures requiring withholding from employees' earnings. Moreover, the State Administrator would be responsible for the administration of the entire withholding system, rather than having several different withholding systems with different administrative agencies responsible.

The Commission is hopeful that lawyers and the courts will recognize the benefits of the proposed system and that it will be routinely used in marriage dissolution cases and that judgments for delinquent support payments will become relatively rare. When such payments are not kept current, it is often impossible to recover the past due payment from the support obligor and dependents are often required to seek welfare benefits because support payments are not made when due. The Commission is concerned that its proposal may not meet legislative approval if the effect of its enactment

would be to preclude other creditors from using wage garnishment to secure payment of their judgments, even where the judgment debtor has substantial income. At the same time, the liberal exemptions provided in the recommended legislation will adequately protect low income wage earners who are support obligors, not only in circumstances where they would be protected under the federal law but also in analogous circumstances where similar protection is not now afforded. For this reason, the Commission believes that the recommended legislation should be held to satisfy the purpose of the federal statute as stated in Section 301 of the CCPA.

If the recommended provisions relating to support are determined not to satisfy federal requirements, would federal requirements be satisfied if an order directing the employer to withhold on a continuing basis for current support were treated as proposed by the Commission and a garnishment order based on a judgment for delinquent support payments were treated as any other judgment (and amounts withheld from earnings in payment of such judgment were subtracted from the 25 percent of disposable earnings in determining the amount of earnings that could be withheld under another garnishment)?

BANK ACCOUNTS

The Commission is aware of the public domain opinion holding that the federal restrictions on garnishment of earnings apply where a corporation pays 800 of its employees by depositing the total amount due these employees with a local bank and the bank deposits the net pay due each employee to an account set up for the employee. The opinion holds that the bank is acting as the agent of the employer and that garnishment of the bank accounts is limited by the federal restrictions. The Commission plans to include a provision in the recommended legislation to extend the proposed restrictions on garnishment of earnings in the hands of an employer to the type of situation involved in the opinion.

It is fairly easy to apply garnishment restrictions in the case considered by the opinion. The bank is computing the net pay of the employee and depositing it to his account. When that account is garnished, the bank knows both the source of the earnings (unless the employee is depositing additional amounts) and the amount of the "disposable earnings." The bank can easily compute the amount of protected earnings (assuming that only that amount that the bank knows is earnings is protected). There is no need for the employee to claim an exemption (at least as far as the amount of his earnings that the bank has deposited to his account). Where the bank is not the employer's payroll agent, however, the bank does not know the source of deposits and cannot compute the amount to be withheld. A claim must be made, tracing of earnings is required, and first-in, first-out or similar rules must be developed.

The Commission believes that serious practical problems are presented in attempting to apply the general garnishment restrictions to bank accounts

in situations other than the one involved in the opinion. At the same time, the Commission believes that it is important that protection be afforded to bank accounts to protect low income debtors. The Commission recommendation concerning bank accounts is discussed on pages 14-16 of its recommendation and the proposed legislation is Section 690.7 (pages 29-32 of the recommendation). This recommendation is strongly opposed by representatives of creditors and similar recommendations failed to meet approval at the 1971 session of the California Legislature. The Commission does not believe that the federal statute requires general protection of bank accounts and, if it does, the Commission believes that its recommended provision should be held to provide sufficient protection to obtain federal approval. An alternative type of exemption--based on tracing of earnings, hearings on whether the portion of the earnings spent were the 75 percent exempt under the federal law, allocation of earnings to pay periods, and the like--would be another source of court congestion and the burdensome procedural requirements would require considerable sophistication on the part of the debtor.

STATE ADMINISTRATOR

There will, of course, be areas of the law--such as the proper treatment of bonuses, retroactive pay increases, and the like--that are not dealt with in detail in the recommended legislation. The State Administrator is authorized to adopt regulations dealing with these matters. This will permit continuing conformance with federal regulations and interpretations of the federal law.

DISCHARGE FROM EMPLOYMENT BECAUSE OF WAGE GARNISHMENT

The Commission recognizes that the federal prohibition against discharge from employment because of garnishment for any one indebtedness continues to apply even if the state is granted an exemption from Section 303(a) of the CCPA. Nevertheless, the Commission recommended to the 1971 Legislature that a civil penalty be provided to supplement the federal criminal penalty and this recommendation resulted in the enactment of Section 2929 of the Labor Code. This section is further amended on pages 77-78 of the recommended legislation.