



American Payroll Association

Government Relations • Washington, DC

Statement in Support of H. 3135 and in Opposition to S. 1008

Joint Committee on Labor and Workforce Development

May 2, 2017

The American Payroll Association (“APA”) appreciates the opportunity to provide comments on S. 1008 and H. 3135. Both bills address the use of payroll cards for wage payment in Massachusetts. **The APA supports H. 3135**, as it would codify the existing administrative position on payroll cards and require that important consumer protections be in place. **We strongly oppose S. 1008**, as it would unnecessarily encumber the use of this beneficial payment method in Massachusetts and require employers to provide free banking services to one group of employees simply because they have elected to receive their wages on a payroll card.

About the American Payroll Association

The APA is a nonprofit professional association representing more than 20,000 payroll professionals and their companies in the United States. We have 476 members in Massachusetts, and many of our members across the country process payroll for employees who work in the Commonwealth.

The APA’s primary mission is to educate its members and the payroll industry regarding best practices associated with paying America’s workers while complying with applicable federal, state, and local laws. The APA, through its Government Relations Task Force, has spent the past decade monitoring the increasing use of payroll cards in the workplace. The APA has advocated for sensible regulation of payroll cards to ensure that employers are able to offer this beneficial payment method to their employees and that employees can use payroll cards to their best advantage. It is essential, however, that any such legislation be carefully drafted to accomplish the purposes of the wage payment statutes without imposing unnecessary and prohibitive burdens on employers.

The Benefits of Electronic Wage Payments Are Undeniable

A payroll card is a reloadable, prepaid card issued to an employee through the employer that allows the employee to receive and access wages from an account established on his or her behalf at a financial institution. Each payday, the employee’s net wages are deposited into his or her payroll card account. At that point, ownership of the funds transfers to the employee. The employee can then use the payroll card to access his or her full net wages in cash or to make purchases and pay bills in person, online, or over the telephone.

Payroll cards bring the benefits of direct deposit to employees who do not have bank accounts and to employees with limited access to traditional financial services. According to a 2015 study by the FDIC, 21.7% of all households in Massachusetts are either unbanked (having no checking or savings account) or underbanked (having a checking or savings account, but still reliant on

alternative financial services such as check cashing).¹ These workers often receive their wages by check. Although Massachusetts law requires employers to provide their employees with facilities for cashing their paychecks without charge,² many workers still utilize check cashing services to access their wages. Commonwealth law does not set or limit the fees that a check cashing outlet may charge. A 2012 study by the Massachusetts Division of Banks concluded that an unbanked employee in Massachusetts earning \$30,000 a year who is paid with a paper check spends approximately \$650 a year in fees to cash their checks and purchase money orders to pay their bills.³

Payroll cards offer underserved workers a valuable solution by providing them with a means of accessing their full net wages each pay period at several locations without cost.⁴ Like other forms of direct deposit, payroll cards are safe, secure, and convenient. They also allow employers to deliver wages to employees in a timely manner, even when the employee is away from the workplace and when faced with unexpected contingencies such as severe weather and natural disasters. According to Javier Palomarez, President and CEO of the United States Hispanic Chamber of Commerce:

Payroll cards offer those with no banking access a dependable option for protecting their finances. Empowering our citizens with this much needed access, security, and convenience of prepaid payroll cards allows the unbanked to save more of what they earn and helps them build a solid financial foundation.⁵

In light of these benefits, it is not surprising that the use of payroll cards is now mainstream and recognized across the country as a lawful method of wage payment.

The Treatment of Payroll Cards Under Massachusetts Law

The Massachusetts Commissioner of Banks (“Commissioner”) has long interpreted Commonwealth law as allowing employers to compensate their employees using electronic fund transfers (e.g., direct deposit) so long as employees are able to select the financial institution that will receive their wage deposits.⁶ In letters issued in 2000 and 2004, the Commissioner noted that this interpretation is consistent with federal Regulation E.⁷ Regulation E implements the Electronic Fund Transfer Act and, since 2007, has recognized payroll cards to be a covered account that an employee may designate for the receipt of wages.⁸

In response to inquiries by the APA and its members, the Massachusetts Attorney General’s Office has confirmed that Commonwealth law permits employers to give their employees the choice between direct deposit to an account of their choosing and a payroll card account so long as the following requirements are met: (1) an employee who selects a payroll card account must be able

¹ FDIC, National Survey of Unbanked and Underbanked Households, Appendix A-7 (2015), <https://www.fdic.gov/householdsurvey/2015/2015appendix.pdf>.

² Mass. Gen. Law ch. 149, §148.

³ Massachusetts Division of Banks, 2012 Report on Check Cashers and Basic Banking Fees, available at <http://www.mass.gov/ocabr/docs/2012-report-on-check-casher-and-basic-banking-fees.pdf>.

⁴ Branded payroll cards can be used anywhere that the payment brand (Visa or MasterCard) is accepted. Indeed, employees can use their payroll cards to withdraw their full net wages at the teller of any financial institution that is a member of the payment brand (tens of thousands of locations nationwide) at least once each pay period at no cost.

⁵ http://www.huffingtonpost.com/javier-palomarez/payroll-cards-a-valuable-_b_4555801.html

⁶ Mass. Div. of Banks, Op. Letters No. 04-041 (June 30, 2004), 00-148 (October 27, 2000).

⁷ *Id.*

⁸ 12 C.F.R. §1005.18.

to revert to direct deposit at a financial institution of his or her choosing, and (2) the employee must be provided one means of withdrawing his or her full net wages each pay period. Massachusetts is in good company with half of the states that allow employers to pay their employees using electronic means only.

The APA supports H. 3135, which requires important consumer protections on payroll cards

The APA supports H. 3135 as it imposes reasonable restrictions on the use of payroll card accounts that are designed to ensure full and free access to wages without imposing unnecessary and prohibitive burdens on employers and card issuers.

H. 3135 would codify the existing administrative position on payroll cards while ensuring that payroll cards offered in Massachusetts carry important consumer protections. Specifically, H. 3135 would require the following:

Regulation E Compliance. H. 3135 would put employers on notice that all payroll card programs must carry the consumer protections applicable to payroll cards under Regulation E. These protections include disclosure of terms and conditions (including fees) by the issuer, access to account information, dispute resolution procedures, limited liability for unauthorized card use, and advance notice of changes in terms and conditions of the account.⁹ In addition, Regulation E's compulsory use provision prohibits employers from requiring that their employees receive electronic transfers of wages to a payroll card account. An employer must offer at least one other payment option such as direct deposit to an account of the employee's choosing.¹⁰

Full and Free Access to Wages. H. 3135 would require employers who offer payroll cards to provide employees with the ability to make at least one withdrawal from the payroll card account each pay period without charge for any amount up to the full amount of the employee's net wages. In other words, employees must be able to cash out their net wages each pay period without cost like they would a paper paycheck.

Disclosure of Fees. Employers who offer payroll cards would be required to provide employees with advance notice of any fees associated with the use of the payroll card. Employers would not be responsible for fees charged by third parties that are beyond their control, however. As discussed above, Regulation E imposes additional disclosure requirements on the card issuer.

Free Access to Account Information. H. 3135 would require that employees who receive wages via a payroll card account be provided with a means of checking their account balance, either online or through an automated telephone system, without cost irrespective of the number of inquiries made.

⁹ Under Regulation E, the issuer is responsible for providing these protections on covered accounts. *See* 12 C.F.R. Part 1005. Under H. 3135, the employer would be responsible for selecting a payroll card program that is Regulation E compliant.

¹⁰ 12 C.F.R. § 1005.10 (e)(2); CFPB Bulletin No. 2013-10 (September 12, 2013).

The APA opposes S. 1008, which is unduly burdensome, vague, and contains provisions that are impossible to satisfy

S. 1008 mirrors a 2016 New York regulation that was invalidated by the State Industrial Board of Appeals prior to its effective date.¹¹ The APA submitted three comment letters and met with the New York State Department of Labor at least twice during the rulemaking process. Among other things we expressed serious concern that the regulation imposed a number of unduly burdensome requirements on employers and payroll card providers that would have limited their ability to continue to offer beneficial payroll card programs in the state. Moreover, portions of the regulation were vague, making compliance difficult for employers, while other provisions were simply impossible to satisfy. For the same reasons, the APA vehemently opposes S. 1008.

Among other things, S. 1008 would require the following:

Notice Requirements. Proposed section 148E(b) would require employers who offer direct deposit and/or payroll cards (referred to as “payroll debit cards” in the bill) to provide their employees with written notice of the following items: (1) a description of all of their wage payment options; (2) a statement that the employer may not require payment by payroll card; (3) a statement that employees may not be charged any fees for services that are necessary for the employee to access his or her wages in full; and (4) a list of locations where employees can access and withdraw wages at no charge “within a reasonable proximity to their place of residence or place of work.” In addition, proposed section 148E(e) would require that the notice be provided in English and in the primary language of the employee when a template notice and consent in such language is available.

The APA supports provisions requiring that employees be provided advance notice of the terms and conditions of their wage payment options. However, S. 1008’s disclosure requirements are unduly burdensome, cast payroll cards in a negative light, and are vague. For example, it is not clear what must be included on the list of locations where employees can access their wages at no charge. As written, this requirement is not limited to locations where employees are able to access their full net wages. Does this mean that the employer must include every ATM, financial institution, and other establishment within reasonable proximity where the employee could access wages without charge? It would be extremely difficult for employers to track the precise locations of free cash access relative to each employee’s place of work or residence, particularly with respect to employees who telecommute. Moreover, “reasonable proximity” is not defined in S. 1008 making it even less clear what employers would be required to do to comply with this provision.

The APA believes that a list is unnecessary because employees can take a branded payroll card to any financial institution that is a member of the payment brand (i.e., Visa or MasterCard) and obtain their full net wages from the bank teller at least once each pay period without cost. Moreover, employees are able to locate nearby ATMs online and using mobile applications. Finally, it is unclear how employers are expected to provide this information to employees who designate a personal bank account for direct deposit.

Similarly, it is not clear what is meant by “services that are necessary for the employee to access his or her wages in full.” The APA is concerned that this requirement will give rise to considerable

¹¹ See, 12 NYCRR Part 192, invalidated by *Global Cash Card v. Commissioner of Labor*, State of New York Industrial Appeals Board Docket No. 16-120 (Resolution of Decision, February 16, 2017). S. 1008 appears to be identical to the invalidated New York regulation in all material respects except that S. 1008 would not require employee consent for traditional direct deposit.

confusion among employees because what services are necessary to access wages in full is subject to varying interpretations. Finally, it is unclear whether employers would be required to use the templates provided by the Commissioner, what form the notice would need to take if the Commissioner has not provided a template in an employee's primary language, and whether use of the templates would provide a safe harbor.

Consent and the Seven Day Cooling-Off Period. Under S. 1008, employers would be required to obtain advance written consent from an employee before paying the employee using a payroll card. Consent could (or perhaps must) be obtained using a template prepared by the Commissioner. Once consent is obtained, the employer would be required to wait seven business days before paying employees using a payroll card. The employee must be able to withdraw his or her consent at any time. Consistent with existing Massachusetts law, written consent would not be required for traditional direct deposit so long as the employee is permitted to designate the account that receives the deposit [proposed section 148E(a), (c), and (g)].

The cooling off period described above casts payroll cards in a negative light and is likely to suggest to employees that there is something unsafe or inferior about the payment method. Moreover, taken together, the above provisions would discourage employers from offering or continuing to offer payroll cards because doing so would require them to reintroduce inefficient paper paychecks into their payroll systems. This is because an employee who fails to provide the information necessary for direct deposit, and who initially consents to payment via a payroll card but later withdraws that consent, must still be paid on an ongoing basis.¹² Similarly, employees who quit during the cooling off period or are paid on a weekly basis may need to be paid by check or in cash for the initial pay period. As such, S. 1008 would impose a significant burden on employers who have relied on existing law to eliminate paper paychecks and have given their employees the choice between direct deposit to an account of their choosing and a payroll card account.¹³ If S. 1008 is enacted, employers wishing to enjoy the benefits of purely electronic wage payment will simply stop offering payroll cards to the detriment of their employees.

The cooling off period also presents problems for employers that have elected to continue offering paper paychecks. Keeping track of the authorization forms and ensuring that they are not processed during the cooling off period could be challenging. Employers that utilize employee self-service systems report that they would need to develop new systems to identify when an employee is establishing payment to a payroll card account as opposed to a checking or savings account. Regrettably, a cooling off period would eliminate the ability to use payroll cards to make immediate payments upon request and in times of emergency. Many APA members have used payroll cards to distribute wages and relief payments to employees after 9/11, hurricanes, snow storms, floods, tornadoes and similar events. The bill also precludes the use of payroll cards for manual day laborers.

A cooling off period is unnecessary, and is not required in any other state.

Unlimited Free Withdrawals at Local ATMs. Proposed section 148E(h) would prohibit employers from paying wages using a payroll card unless the card provides “local access to one or more

¹² S. 1008 would require that employees be able to withdraw their consent to a payroll card at any time. At the same time, it would prohibit employers from making consent to a payroll card a condition of continued employment and from discharging an employee who has not consented to receive wages in this manner. See Proposed section 148E(a), (c) and (f).

¹³ These burdens include reinstating the infrastructure necessary to process, print and deliver paper paychecks; managing issues and costs related to lost and stolen paychecks; and administering the escheat process for unclaimed checks.

automated teller machines that offers withdrawals at *no cost* to the employee.” “Local access” is defined as access to wages “within a reasonable travel distance to the employee’s work location or home.” “No cost” is defined to mean that “an employee can access his or her wages, in full, without encumbrances, costs, charges or fees.” The term “no cost” is used only once in S. 1008, in the context of ATM access. This provision is simply impossible to satisfy. An employee cannot withdraw his or her wages in full at an ATM as ATMs disburse funds only in \$10 or \$20 increments and often carry daily withdrawal limits. Even if it were possible to access full wages from an ATM, “reasonable travel distance” is not defined, leaving it unclear what employers must do to comply.

The APA also is concerned that requiring unlimited free ATM withdrawals would make offering payroll cards in Massachusetts challenging economically, if not unsustainable altogether. This is because most payroll card providers do not own a network of ATMs. Instead, they must contract with third-party networks, like Allpoint and MoneyPass, to provide employees with in-network ATM access and must pay a fee for each cardholder transaction. Providers cannot recoup these costs through monthly maintenance fees or by requiring minimum account balances, like financial institutions do with demand deposit accounts used for direct deposit, because such fees would violate the full and free access to wages requirement.

All programs provide employees with the ability to access their wages without cost, and studies have shown that many employees use their payroll cards without ever incurring fees.¹⁴ As with other methods of payment, however, employees can incur fees if they fail to take advantage of the many free methods of cash access offered by the payroll card program. This is no different than an underserved employee who fails to take advantage of the free method of cashing his or her paycheck provided by his or her employer and instead incurs a fee at a check cashing establishment. Yet, if S. 1008 is enacted, the two employees would be treated very differently. The employee who decides not to utilize the free method of check cashing is out of luck. The employee who elects not to utilize the free methods of withdrawing full wages from his or her payroll card account must be provided with an unlimited number of additional opportunities to withdraw wages without charge at in-network ATMs.

Fee Restrictions. S. 1008 would require employers to notify employees who are offered direct deposit or a payroll card that they “may not be charged any fees for services that are necessary [to access] wages in full.” Proposed section 148E(i) would go well beyond prohibiting fees for services necessary to access wages and would prohibit employers and their agents from charging almost any fee associated with use of a payroll card.

Some of the most disturbing fee prohibitions in S. 1008 are those prohibiting fees for ATM withdrawals, in-network ATM balance inquiries,¹⁵ account inactivity, and declined transactions at an ATM that does not provide free balance inquiries. These services are expensive for programs to provide and are not essential to full and free access to wages. Moreover, the fees associated with these services can easily be avoided by employees. The fact that payroll cards are offered through the employer channel should not make employers responsible for the cost of banking services that are not essential to full and free access to wages.

¹⁴ See, e.g., S. Wilshusen, R. Hunt, J. van Opstal, and R. Schneider, *Consumers’ Use of Prepaid Cards: A Transaction-Based Analysis* (FRB of Philadelphia Payment Cards Center, August 2012).

¹⁵All programs provide other means of accessing the account balance that are less costly to provide. For example, it is common for programs to provide employees with the ability to check their account balances over the telephone (e.g., IVR), online, and/or via e-mail or texts.

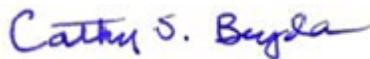
APA is are concerned that the prohibition on fees for “other actions necessary to receive wages or hold the payroll debit card” is vague and offers little guidance on how to comply.

Thirty Days’ Advance Notice of Changes in Terms. Proposed section 148E(m) would require employers to provide advance notice of any changes in terms and conditions of the payroll card account. Regulation E already requires card issuers to provide such notice, and S. 1008 would deviate from the well-established Regulation E procedures in at least two important respects. First, it would require 30 days’ advance notice, rather than 21 days’ notice. Second, it would require issuers to provide advance notice of *any* change not just adverse changes. Requiring providers to establish a different set of rules for providers who issue payroll cards to employees working in Massachusetts would impose an unnecessary burden on payroll card programs in the Commonwealth with little or no benefit to cardholders. Moreover, requiring vendors to provide advance notice of any change is likely to discourage beneficial program changes and inhibit innovation. Finally, S. 1008 fails to recognize that the card issuer, not the employer, maintains the terms and conditions of the payroll card account. Employers should not be responsible for banking processes over which they have little or no control.

90-Day Implementation Period. S. 1008 does not include an effective date. Accordingly, if enacted, the bill would become effective 90 days after being signed by Governor Baker or, if not signed by the governor, 90 days after the end of the session.¹⁶ The changes set forth in S. 1008 are drastic and, if enacted as proposed, would require the implementation of new procedures and processes that would be unique to Massachusetts. Additional time would be needed for the Commissioner to develop the required notice and consent templates; for employers to thoroughly analyze the new requirements, reintroduce the procedures necessary to process and deliver paper paychecks, and satisfy other new statutory requirements; and for providers to determine whether they are able to continue to offer payroll cards in Massachusetts and, if so, to identify and implement system changes, develop training and adoption materials, and reconfigure current program infrastructure.

Conclusion

The APA appreciates the opportunity to submit this statement in support of H. 3135 and in opposition to S. 1008. We would welcome further opportunity to discuss these bills in particular and payroll practices in general. In this regard, please feel free to contact Bill Dunn (202-232-6889) or Cathy Beyda (408-973-8215).



Cathy Beyda, Esq.
Chair, GRTF Payroll Card Subcommittee
American Payroll Association



William Dunn, CPP
Director, Government Relations
American Payroll Association

¹⁶ Massachusetts Constitution, art. 48, The Initiative, VI, The Referendum.