



American Payroll Association

Government Relations • Washington, DC

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Carter D. Frantz
Chief Counsel
Pennsylvania Department of Banking
Office of Chief Counsel
17 N. Second Street, 13th Floor
Harrisburg, PA 17101
cafrantz@state.pa.us

James A. Holzman
Deputy Chief Counsel
Pennsylvania Department of Labor & Industry
Office of Chief Counsel
651 Boas Street, 10th Floor
Harrisburg, PA 17121
jholzman@state.pa.us

Robert A. Mulle
Deputy Chief Attorney General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Dear Mr. Frantz, Mr. Holzman and Mr. Mulle,

By way of this letter, the American Payroll Association (APA) requests that the Commonwealth of Pennsylvania clarify its position on paperless wage payment programs (i.e., programs that give employees the choice between receiving their wages by direct deposit or on a payroll card). Many of our members have expressed an interest in implementing electronic wage payment programs given the many benefits that they offer. As discussed below, these benefits include: (1) a substantial cost savings, (2) immediate access to wages no matter where the employee is located, (3) convenience, (4) increased security, (5) access to wages even when faced with inclement weather and natural disasters, (6) ease of compliance with strict final wage payment requirements and (7) a positive environmental impact.

The APA previously contacted both the Department of Labor and Industries and the Department of Banking and appreciates the guidance provided by these agencies. As discussed below, however, some questions remain unresolved and it is unclear whether there is an agency responsible for interpreting and enforcing the statutory provisions regarding electronic wage payment. For this reason, we have addressed this request to both agencies, as well as the Attorney General's Office, in the hope that this issue can be resolved and appropriate guidance provided to employers.

The APA specifically requests that the Attorney General's Office or the appropriate agency issue an opinion letter or adopt regulations addressing the circumstances under which employers may implement purely electronic wage payment programs. The relevant issues, as

well as sample regulatory language, are set forth below. In addition, we discuss three approaches to paperless pay utilized by states with wage payment statutes similar to Pennsylvania's statutory framework.

I. INTRODUCTION

A. The American Payroll Association

The APA is a nonprofit professional association representing more than 24,000 payroll professionals and their companies in the United States and Canada. 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. In addition, the APA's Government Affairs Task Force works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

In 2004, the APA's Government Affairs Task Force formed a Payroll Card Subcommittee in response to an increased interest by employer's in the use of payroll cards as part of their wage payment program. This subcommittee monitors the development and use of payroll cards within the employer community and helps educate policymakers and regulators about the benefits and uses of the cards. The subcommittee is made up of many active and knowledgeable APA members representing large and mid-size employers, payroll service providers, and other vendors and entities interested in payroll card programs.

B. A Description of Payroll Cards

A payroll card is a pre-paid, reloadable ("stored value") card issued through a national or regional bank. On payday, the card is electronically loaded with the full amount of the employee's net pay. The employee can then use the payroll card to access his or her wages. Payroll cards normally are offered as an alternative to other methods of wage payment such as direct deposit.¹

Virtually every payroll card program today allows employees to withdraw their entire net pay, or deposit the amount into their checking and/or savings account, at least once each pay period at no cost. Depending on the program, employees usually are able to access their pay in a variety of other ways, such as ATM withdrawals, bank teller transactions and point of sale transactions. Employees who are paid using a branded payroll card (i.e., one bearing the Visa, MasterCard or Discover logo) are able to walk into any bank that issues that particular brand of card and obtain their full wages from the bank teller without fees. This means that employees can access their full wages on payday with no fee at tens of thousands of locations nationwide.

¹ Indeed, a program mandating payroll cards alone would violate Federal Reserve Regulation E which prohibits an employer from requiring its employees to receive wages by electronic fund transfer to a particular financial institution. Nevertheless, the Federal Reserve Board takes the position that employer may comply with regulation E by giving employees the choice between payment by direct deposit or on a payroll card. 71 Fed. Reg. 1473, 1479 (January 10, 2006).

II. CURRENT LEGAL FRAMEWORK AND SUGGESTED ADMINISTRATIVE APPROACHES

A. Applicable Pennsylvania Legal Authorities

As you know, Pennsylvania's Wage Payment and Collection Law requires that wages be paid "in lawful money of the United States or check, ..." 43 P.S. § 260.3. In turn, the Banking Code provides:

For purposes of any statute ... requiring any payment to be made in lawful money or by check, whether for wages, salaries, commissions or other claim of any kind, such payment may be made by credit to an account in a bank, credit union or other financial institution authorized to accept deposits or payments designated by the recipient of such payment if the recipient has requested such method of payment in writing.

7 P.S. § 6121. The Banking Code further requires that the written agreement set forth all terms and conditions under which the transfers are to be made and the methods by which the wage-earner may withdraw his or her request and terminate the agreement. 7 P.S. § 6122.

Neither the Wage Payment and Collection Law nor the Banking Code specifically addresses the use of payroll cards. In a letter addressed to the American Payroll Association dated July 2, 2008, the Pennsylvania Department of Labor and Industries, Bureau of Labor Law Compliance ("Bureau") suggested that for purposes of the Wage Payment and Collection Law, it would be prudent for employers to obtain employee authorization when using alternative forms of wage payment such as direct deposit and payroll cards. The Bureau also stated that payment using a debit card is covered by sections 6121 and 6122 of the Banking Code and that these provisions fall within the jurisdiction of the Pennsylvania Banking Department.

In September 2005, the Department of Banking issued an opinion letter addressing a payroll card program and concluded that the program under review did not violate any of the laws within the Department's jurisdiction. In a footnote, however, it stated that sections 6121 and 6122 of the Banking Code were outside of its jurisdiction. The Department confirmed that this is the case in a more recent conversation.

Thus, both the Department of Labor and Industries and the Department of Banking recognize payroll cards as a permissible method of wage payment under Pennsylvania law. It is not clear, however, whether employers in Pennsylvania may implement purely electronic wage payment programs without also offering employees the option of a paper paycheck. Nor is it clear who can answer these questions.

B. Suggested Administrative Approaches

The wage payment statutes and regulations in a number of states are similar to Pennsylvania's Wage Payment and Collection Law. Many of these states permit paperless wage payment. The following is a brief discussion of three approaches used by other states when addressing electronic wage payment.

1. Payroll Cards as the Functional Equivalent of Cash or Checks

One group of states takes the position that payroll cards are the functional equivalent of cash or checks and, therefore, may be used to compensate employees so long as the conditions for payment in cash or by check are satisfied. Delaware, for example, has adopted a regulation stating in pertinent part:

Delaware's Wage Payment and Collection Act requires the payment of wages to employees in lawful money or checks payable on demand, "provided suitable arrangements are made by the employer for cashing such checks for the full amount of the wages due at a bank or other business establishment convenient to the place of employment." Employers may comply with this requirement by issuing a payroll debit card which provides the functional equivalent of cash or a check. ...

Code of Del. Regs. § 65-400-013 (2.0). "Functional equivalent," in turn, is defined by the regulations to mean "a change in the form of the payment of wages without impacting the substantive rights or value of the employee's wages. For example, a debit card in lieu of cash, check, or credit must provide the full amount of wages without cost to the employee on the regular payday." Code of Del. Regs. § 65-400-013 (1.7).

Indiana has issued an informal letter to the same effect.² In these states, so long as employees are able to access their full wages on payday without cost, payroll cards may be used like a conventional paper paycheck. Thus, one possible approach for Pennsylvania would be for the Department of Labor and Industries to adopt regulations or issue an opinion letter recognizing payroll cards to be the functional equivalent of cash or a check.

2. Electronic Wage Payment as a Condition of Employment

A second approach would be to make clear that consent to electronic wage payment may be made a condition of hire or continued employment. This is the approach taken in Texas.³ This approach appears to be consistent with Pennsylvania's case law authority. In *Statler v. Unemployment Compensation Board of Review*, 728 A.2d 1029 (Pa. Cmwlth 1999), for example, the court held that an employee who was terminated for failing to complete a form authorizing direct deposit of his wages was not entitled to unemployment benefits because the refusal to sign the authorization form constituted willful misconduct. See 43 P.S. § 802(e) (An employee is ineligible for compensation where his unemployment is due to "discharge ... from work for willful misconduct connected with his work ...").⁴ According to the court, an employee

² The Tennessee Attorney General has even issued an opinion letter stating that payment by direct deposit is considered payment of money of the United States. Tenn. Atty Gen. Op. No. 86-94.

³ Under Texas law, an employee must agree in writing to methods of wage payment other than cash, check or electronic fund transfer. Tex. Labor Code § 61.016(b). The Texas Workforce Commission has advised that this provision applies to payroll cards but that an employer may make written authorization to payment using a payroll card a condition of hire or continued employment.

⁴ The employee's employment was subject to a collective bargaining agreement stating that as a condition of employment, all current employees were required to make the necessary arrangements to allow for electronic fund transfer. The employee refused to sign the authorization form, however, claiming that it gave the employer access to his personal banking account because it authorized the employer to make appropriate adjustments in the event of an overpayment. The employee refused to sign even after

waives his or her right to object to an employer's reasonable requests when he or she voluntarily assumes a legal relationship with the employer. *Id.*

Other Pennsylvania courts similarly have held that employers may require at-will employees to consent to a particular term as a condition of hire or continued employment. See, e.g., *Beach v. Burns International Security Services*, 593 A.2d 1285 (Pa. Super. 1991) (requiring at-will employees to sign a jury waiver form as a condition of employment did not violate public policy and, therefore, was permitted); *Kelchner v. Sycamore Manor Health Center*, 305 F.Supp.2d 429 (M.D. Pa. 2004), *affirmed* 135 Fed. Appx. 499 (3rd Cir. 2005) (employer may require that employee authorize procurement of a consumer report as a condition of continued employment so long as the employer complies with the Fair Credit Reporting Act when procuring the report); *ATM Corp. of America v. Unemployment Compensation Board of Review*, 892 A.2d 859 (Pa. Cmwlth 2006) (employee's refusal to authorize a background check constituted willful misconduct rendering the employee ineligible for unemployment compensation).

An employer may not, however, require employees to consent to a term of employment if doing so would violate a well established public policy.⁵ Arguably, requiring employees to consent to direct deposit alone could violate public policy because such a program would exclude a particular segment of the population (i.e., those unable to obtain bank accounts) from employment. Studies have shown that these “unbanked” employees tend to come from minority groups. When payroll cards are offered along with direct deposit, however, personal bank accounts are not required and, therefore, every employee is eligible to participate. There is no risk of disparate treatment and, therefore, no risk that the requirement would violate public policy. Accordingly, employers in Pennsylvania should be permitted to require written authorization for direct deposit or payroll cards as a condition of hire or continued employment.

3. Payroll Cards as a Default for Employees Who Fail to Authorize Direct Deposit

A third group of states permits purely electronic wage payment programs so long as an employee that fails to designate a financial institution and/or authorize direct deposit is offered an alternative method of wage payment. Purely electronic wage payment is permitted because an employee that fails to designate a financial institution may be offered a payroll card as the default option. Kansas and Virginia are two states that take this approach. The Kansas statute provides in pertinent part:

- (b) The employer may designate the method by which employees receive wages, provided all wages shall be paid by one or more of the following methods:
 - (1) In lawful money of the United States;
 - (2) by check or draft which is negotiable in the community wherein the place of employment is located;

the employer offered to accommodate his concerns by instructing him to strike the offending language from the form.

⁵ For example, under Pennsylvania law, compelling an employee to consent to a polygraph examination under threat of job termination would contravene the well established public policy set forth in section 7321 of the Criminal Code. 18 P.S. § 7321; See, also, *Leibowitz v. H.A. Winston Company*, 493 A.2d 111 (Pa. Super. 1985). This section makes it a misdemeanor for an employer to require an applicant or employee to submit to a polygraph examination as a condition of employment or continued employment.

- (3) by electronic fund transfer or deposit to an automated clearinghouse member financial institution account designated by the employee; or
- (4) by payroll card.

(c) Any employer that elects to pay wages only by a method authorized in subsection (b)(3) shall offer an alternative payment method as a default option for employees that fail to designate a financial institution account for electronic fund transfer or deposit.

(d) Any employer that elects to pay wages using a payroll card as authorized in subsection (b)(4) shall allow employees at least one means of fund access withdrawal per pay period at no cost to the employee for an amount up to and including the total amount of the employee's net wages, as stated on the employee's earnings statement

Kansas Stat. § 44-314(b)-(d).

C. Sample Regulatory Language

Any one of the above approaches could easily be implemented under Pennsylvania's current statutory scheme, either through the formal rulemaking process or by issuing an opinion letter. As an example, we have drafted the following language that incorporates portions of each of the above approaches in the context of Pennsylvania law:

Nothing in section 260.3 of the Wage Payment and Collection Law or section 6121 and 6122 of the Banking Code prohibits an employer from using a payroll card to deliver wages to employees provided the following conditions are satisfied:

1. Employees are provided at least one means of accessing their entire net pay each pay period without fees, at an established place of business in the state;
2. Employees are provided with information regarding the terms and conditions of the payroll card program, including any fees that may be assessed;
3. Employees continue to receive a statement of wage and deductions each pay period in accordance with 34 Pa. Admin. Code § 231.36. The statement may be provided to employees electronically so long as each employee is provided with a convenient means of accessing the information without fees on payday; and
4. Whenever payroll cards are offered, employees also are given the option of having their wages directly deposited into their personal account at a financial institution of their choice in accordance with sections 6121 and 6122.

III. USE AND BENEFITS OF ELECTRONIC WAGE PAYMENT

A. Electronic Wage Payment Has Gained Widespread Acceptance

During the past five years, the APA has observed a dramatic increase in the use of and interest in electronic wage payment methods including direct deposit and payroll cards. The regulatory environment relating to electronic payment methods also has changed significantly during this time. For example, effective July 2007, the Federal Reserve Board amended Regulation E to make clear that its provisions cover payroll card accounts that are established directly or indirectly through an employer, and to which transfer of employee wages or other compensation is made on a recurring basis. 12 C.F.R. §205.2. Regulation E provides a number of protections to consumers using electronic fund transfer systems. The FDIC also recognizes the increased acceptance and use of payroll cards, and recently issued an opinion stating that the funds underlying payroll cards are insurable deposits.⁶ See, General Counsel's Opinion No. 8 (November 2008). On the state level, 15 states have amended their wage payment statutes and/or regulations to specifically address payroll cards,⁷ and **the law and/or administrative enforcement positions in at least 21 states can be interpreted as allowing employers to use electronic wage payment methods as the exclusive means of compensating their employees.**

In addition, several government departments and agencies now compensate their own employees using direct deposit and/or payroll cards and more than 35 states use prepaid cards (similar to payroll cards) to distribute government benefits such as unemployment insurance payments, aid to families and child support. Food stamps are delivered almost exclusively on prepaid cards and, last year, the Federal government began using prepaid cards to deliver social security benefits to recipients who do not have bank accounts.⁸

In Pennsylvania, unemployment benefits are now paid using debit cards and direct deposit only. Governor Rendell expects that the program will save the Commonwealth two million dollars annually, mostly in reduced mailing and check processing costs. Alan Butkovitz, Controller of the City of Pennsylvania, intends to bring paperless pay to city employees and has stated that "moving to paperless pay checks (direct deposit/debit cards) will increase productivity and eliminate unnecessary expenses."⁹ He estimates that printed paychecks and pay stubs for current city employees and pensioners results in the use of more than one million pieces of paper and costs city taxpayers up to \$500,000 in materials, labor and postage each year.¹⁰

⁶ FDIC General Counsel's Opinion No. 8, 73 Federal Register No. 220, at p. 67155 (Nov. 13, 2008), available at <http://edocket.access.gpo.gov/2008/pdf/E8-26867.pdf>.

⁷ These states are Colorado, Delaware, Florida Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Virginia and West Virginia. In addition, Utah has issued proposed regulations governing the use of payroll cards and currently is reviewing comments submitted in response to the proposal.

⁸ Financial Management Service, Press Release, *U.S. Treasuring to Launch Prepaid Cards for Unbanked Social Security, SSI Benefit Recipients* (January 4, 2008) available at http://www.fms.treas.gov/news/press/financial_agent.html.

⁹ Press Release, Office of the Controller, City of Pennsylvania (Sept. 17, 2008), located at <http://www.philadelphiacontroller.org/page.asp?id=334>

¹⁰ *Id.* Mr. Butkovitz also emphasized the environmental benefits of paperless payroll, stating:

Not surprisingly, the increased use of electronic wage payment methods corresponds with a decreased reliance on paper checks. The United States Government Accountability Office has observed that: "By 2003, led by rapid growth in debit card payments, the number of electronic payments exceeded the number of check payments for the first time in U.S. history."¹¹ The Federal Reserve estimates that roughly 30 billion checks were paid in the United States in 2006, down from approximately 37 billion in 2003, and 42 billion in 2001.¹² This is one reason why the Federal Reserve has reduced the number of locations where it processes paper checks from 45 in 2003 to 18 in 2008, with only four locations scheduled to remain by early 2010.¹³

B. Benefits of Electronic Wage Payment

The rapid acceptance of electronic payment methods is undoubtedly due to the many benefits that they offer to both employees and employers alike. From the employee's perspective, direct deposit and payroll cards eliminate check cashing fees and remove delivery problems that often result when, for example, an employee is ill or traveling. Electronic wage payment also facilitates the delivery of wages during inclement weather and natural disasters. Employees without bank accounts, who are likely to be the principal users of payroll cards, generally incur high fees when cashing their payroll checks and then incur additional costs when paying bills using money orders or traveling to a payment location to pay in cash.¹⁴ These fees are eliminated when employees are given the option of receiving their wages by direct deposit or on a payroll card. In fact, payroll cards have been found to be one of the least expensive ways for an employee to receive wages.¹⁵ Accordingly, it is not surprising that a study by the Comptroller

In addition, it will help advance the City's sustainability goals by eliminating almost 5 tons of paper per year and saving more than 130 trees. A transition to paperless pay would place Philadelphia in the vanguard of municipal governments in green operating policy and set an important precedent in the City and the region.

http://www.philadelphiacontroller.org/publications/fpau/paperless_pay_report_9-16-2008.pdf

¹¹ United States Government Accountability Office, *Electronic Payments: Many Programs Disburse Federal Benefits, and More Outreach Could Increase Use*, GAO-08-645 (June 2008).

¹² Federal Reserve Board Press Release, *Federal Reserve Banks Announce Reduced Number of Check Processing Sites and Accelerated Restructuring Schedule* (November 6, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20081106a.htm>.

¹³ Federal Reserve Board Press Release, *Federal Reserve Banks Announce Restructuring Schedule Changes As Electronic Check Process Continues to Accelerate* (March 31, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20080331a.htm>.

¹⁴ A survey recently conducted by the Brookings Institute reveals that approximately 10 million households in the country lack any type of transaction account (e.g., savings or checking) and approximately 12 million do not have a checking account. Metropolitan Policy Program at Brookings, *Banking on Wealth: America's New Retail Banking Infrastructure and Its Wealth-Building Potential*, January 2008, http://www.brookings.edu/~media/Files/rc/reports/2008/01_banking_fellowes/01_banking_fellowes.pdf.

¹⁵ Federal Reserve Bank of Philadelphia, *The Cost Effectiveness of Stored-Value Products for Unbanked Consumers* (May 2005).

of the Comptroller of the Currency revealed that once employees use a payroll card they rarely revert back to receiving a paper paycheck.¹⁶

Electronic payment methods also reduce the risks associated with lost or stolen paychecks. If a payroll card is lost or stolen, federal liability limitations protection will shield employees from losses arising from fraudulent use. In addition, branded cards (i.e., those bearing a Visa, Mastercard or Discover logo) are covered by the brand's zero liability program.

For employers, the benefits of direct deposit and payroll cards are primarily financial and administrative. The cost of issuing and distributing paper paychecks can be enormous, particularly for large employers and employers with dispersed workforces who often rely on overnight carriers to deliver payroll. Even for smaller employers, electronic payment methods reduce check processing costs and eliminate expenses associated with lost or stolen paychecks. According to the Comptroller of the Currency, it costs businesses between \$8 and \$10 to replace a lost or stolen paycheck, and approximately four million paychecks are lost or stolen every year.¹⁷

Convenience to employees and prompt access to wages translates into increased morale and a more productive workplace as employees spend less time during the working day handling personal banking and finances. Payroll cards also are an attractive option for employers who are looking to become more environmentally conscious.

¹⁶ Comptroller of the Currency, *Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked*, (June 2005).

¹⁷ Comptroller of the Currency, *Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked* (June 2005), available at <http://www.occ.treas.gov/Cdd/payrollcards.pdf>.

IV. CONCLUSION

For the above reasons, the APA respectfully requests that the Commonwealth provide guidance to employers who wish to compensate their employees using electronic payment methods. Employers are particularly interested in whether they may give employees the option of receiving wages by direct deposit or on a payroll card without also offering a paper paycheck option.

We would welcome the opportunity to discuss these issues with you in more detail. In this regard, please feel free to contact Cathy Beyda at (408) 973-8215, Pete Isberg at (610) 827-1591, or Bill Dunn at (202) 232-6889.

Sincerely,

Cathy S. Beyda, Esq.
American Payroll Association
Chair, Paycard Subcommittee, Government Affairs Task Force



Pete Isberg
American Payroll Association
Paycard Legislative Subcommittee, Government Affairs Task Force



William Dunn, CPP
American Payroll Association
Manager of Government Relations