American Payroll Association

Government Relations • Washington, DC

December 11, 2017

Statement in Response to Proposed Revisions to S. 1008 Offered by the Joint Committee on Labor and Workforce Development

The American Payroll Association ("APA") appreciates the opportunity to provide comments on revisions to S. 1008 recently proposed by the Joint Committee on Labor and Workforce Development ("Joint Committee"). As discussed below, the Joint Committee's mark-up of S. 1008 ("S. 1008 mark-up") addresses some of the concerns raised by the APA in our May 2, 2017, Statement in Opposition to S. 1008. While the APA appreciates the proposed revisions, we are concerned that the S. 1008 mark-up continues to impose a number of unduly burdensome requirements on employers and payroll card providers that will limit their ability to offer this beneficial payment method in Massachusetts. In addition, portions of the mark-up remain vague, making it difficult for employers and payroll debit card providers to comply. The APA respectfully requests that the Joint Committee use H. 3135, rather than S. 1008, as the foundation for any payroll card legislation in the commonwealth.

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 492 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.

Background

S. 1008, as introduced, mirrored a 2016 New York wage payment regulation that was invalidated by the State Industrial Board of Appeals prior to its effective date. The APA submitted three comment letters and met with the New York State Department of Labor at least twice during the rulemaking process. 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 submitted a

statement in opposition to S. 1008 on May 2, 2017, and urged the Joint Committee to support H. 3135 instead.

The S. 1008 Mark-Up

At the outset, the APA would like to thank the Joint Committee for addressing some of the concerns raised in our May 2, 2017, statement. For example, the S. 1008 mark-up removes the seven-day cooling-off period and the prohibition on fees for certain declined transactions, and provides that the local access requirement can be satisfied at locations other than ATMs. While we appreciate these improvements, the mark-up continues to include many problematic provisions. Our specific concerns are discussed below.

<u>*Local Access to Wages at No Cost*</u>. The S. 1008 mark-up continues to require that employers provide their employees with "local access" to their wages at no charge. This requirement is vague and difficult to satisfy. "Local access" is defined to mean access to wages "at a facility or machine which is located within a reasonable travel distance to the employee's work location or home." "Reasonable travel distance" is not defined, however, leaving employers with little guidance as to what is needed to comply. Moreover, although the mark-up makes clear that local access can be provided at locations other than ATMs,[1] it would still be difficult to track the precise locations of free cash access relative to each employee's home or place of work. This is particularly true given that many employers have multiple work locations throughout the commonwealth and many employees work offsite or telecommute. An employee's worksite, home, and the locations of cash access (ATMs, bank locations, etc.) are all subject to change, sometimes without the employer's knowledge.

<u>*Notice Requirements*</u>. The S. 1008 mark-up continues to require employers who offer direct deposit and/or payroll debit cards to provide their employees with written notice of:

(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 *at least once per pay period*; and
(4) *access to* a list of locations*, facilities or financial institutions* 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, the S. 1008 mark-up continues to 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 language in italics above represents changes proposed by the Joint Committee.

The APA supports provisions requiring that employees be provided advance notice of the terms and conditions of their wage payment options. However, aspects of the above disclosure requirements remain unnecessarily burdensome or vague. The notice requirements apply to employees who use methods of wage payment other than cash or checks. However, it is not clear how items 3 and 4 above apply when employees elect to receive their wages via direct deposit to their checking or savings account. The fees and locations of free cash access associated with these accounts are matters between the employee and his or her financial institution. In addition, this requirement arguably requires the employer to provide access to a list that includes every ATM, financial institution, grocery store, and other establishment within reasonable proximity where

[1] "Local access" to wages at "no cost" can never be accomplished at ATMs since ATMs typically disburse funds in $10 or $20 increments. "No cost" is defined by the S. 1008 mark-up as access to wages "in full, without encumbrances, costs, charges, or fees."

the employee could access wages without charge. Employers do not have access to this information. As such, it would be difficult, if not impossible, for an employer to satisfy these notice requirements in the context of traditional direct deposit.

Moreover, it is not clear what is meant by the statement that fees may not be charged for "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 confusion among employees because what services are necessary to access wages in full is subject to varying interpretations. Indeed, the S. 1008 mark-up continues to prohibit fees for discretionary services unrelated to full and free access.

Finally, the provisions regarding the notice and consent templates remain vague. It is unclear whether employers would be required to use the templates provided by the commissioner or whether they could prepare their own notice and consent forms. Also, the S. 1008 mark-up does not specify what will happen if the commissioner has not provided a template in an employee's primary language or whether use of the templates would provide a safe harbor for employers. Ultimately, it is difficult to support this process without first seeing the templates. The templates proposed in New York did not comply with regulatory requirements, were difficult to incorporate into an employer's electronic onboarding process, and contained significant errors.

Fee Restrictions. The S. 1008 mark-up continues to prohibit fees for discretionary services that are not necessary for full and free access to wages. For example, it continues to prohibit fees for in-network ATM balance inquiries if that service is provided. All programs provide employees with the ability to check their account balance without cost. It is common for programs to provide the ability to check their account balances over the telephone (e.g., interactive voice response, or IVR), online, via e-mail, and by text. Balance inquiries at ATMs are expensive to provide, however, 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 traditional direct deposit, because these fees would violate the requirement for full and free access to wages.

Similarly, maintaining an inactive account is a very burdensome and expensive process. Finally, the APA is 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. We are concerned that this provision could be used as a catch-all to prohibit almost any fee associated with payroll debit card accounts without putting employers on clear notice that a particular fee is prohibited.

Regulation E Protections. The Joint Committee has decided to incorporate provisions of Regulation E, a federal banking regulation, into the commonwealth's wage payment statutes. These provisions relate to periodic statements, transaction histories, and change in terms notices. This is problematic because the wage payment statutes normally govern the employer-employee relationship. Moreover, any future amendments to Regulation E would not be incorporated into state law without a statutory amendment. In this regard, the federal Consumer Financial Protection Bureau recently revised the provisions of Regulation E that would be added verbatim into state law by the S. 1008 mark-up to provide enhanced consumer protections. These provisions become effective April 1, 2018, and will create a discrepancy between federal and state law if the S. 1008 mark-up is enacted. As such, the proposed provisions conflict with regulations promulgated by the Massachusetts Division of Banks declaring that compliance with Regulation E (including the provisions relating to periodic statements, transaction histories, and change in

terms notices) constitutes compliance with the Massachusetts electronic fund transfer provisions.[2]

90-Day Implementation Period. Neither S. 1008 nor the proposed mark-up 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.[3] The changes set forth in S. 1008 and the S. 1008 mark-up are drastic and, if enacted, 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 and implement the new requirements; and for providers to determine whether they are able to continue to offer payroll debit cards in Massachusetts and, if so, to identify and implement system changes, develop training and adoption materials, and reconfigure current program infrastructure.

H. 3135 Should Serve as the Basis for Payroll Card Legislation in Massachusetts

The APA continues to support H. 3135 as that bill imposes reasonable restrictions on the use of payroll debit card accounts while ensuring that payroll cards offered in Massachusetts carry important consumer protections. To the extent that the Joint Committee feels that legislation addressing payroll debit cards should address additional issues, we urge the Joint Committee to work off H. 3135 rather than a bill modeled after controversial regulations that present numerous challenges and would be difficult to implement.

Conclusion

The APA appreciates the opportunity to offer our comments to the Joint Committee on its proposed mark-up of S. 1008. We would welcome an opportunity to discuss the above issues further and to work with the Joint Committee to develop sensible standards for the use of payroll cards in Massachusetts. In this regard, please feel free to contact Bill Dunn (202-232-6889) or Cathy Beyda (408-973-8215).

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[2] 209 CMR 31.18.
[3] Massachusetts Constitution, art. 48, The Initiative, VI, The Referendum.