American Payroll Association

Government Relations • Washington, DC

Labor Commission
Antidiscrimination and Labor, Labor
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Salt Lake City, UT 84111-2316

June 9, 2009

RESPONSE TO THE UTAH LABOR COMMISSION'S
NOTICE OF PROPOSED RULEMAKING

"Payment of Wages Via Pay Cards"
DAR File No. 32601

The American Payroll Association (APA) submits the following comments in response to the Labor Commission's May 15, 2009, Notice of Proposed Rulemaking and Request for Comments, DAR File No. 32601. The APA strongly supports the promulgation of regulations relating to payroll cards and applauds the Commission for addressing this important issue. At the same time, however, we are concerned that the terms of the proposed rulemaking are unclear and, if not clarified, may actually hinder the use of payroll cards in Utah. Our specific comments and recommendations for revision are set forth below.

The American Payroll Association

The APA is a nonprofit professional association representing more than 23,000 payroll professionals and their companies throughout the United States. 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 also 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 in the use of payroll cards by American employers. 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 interest in payroll card programs.

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Modern Wage Payment Technologies

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. The Federal Deposit Insurance Corporation (FDIC) also has recognized increased acceptance and use of payroll cards and has issued an opinion letter clarifying that the funds underlying a payroll card are FDIC-insured. *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,[1] and the law and/or administrative enforcement positions in at least 20 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 payroll cards, and many government benefits (e.g., social security, unemployment insurance, aid to families and child support) are distributed on debit cards in some jurisdictions.

Comments and Recommendations

While we support the promulgation of regulations addressing payroll cards in Utah, we are concerned that the current proposal is overly burdensome and vague. Our specific comments and recommendations regarding the proposed regulations follow.

1. **The employee must be able to use the paycard twice in a pay period to withdraw funds without incurring a fee or charge.**

The APA understands that this provision is designed to protect employees and to ensure employee access to full wages without fees. We agree with and commend this goal. We are concerned, however, that two free withdrawals each pay period may not meet this goal and would be cost prohibitive for employers. Accordingly, the proposed rule may well have an unintended negative impact on employees.

As you know, payroll cards offer a variety of benefits to employees, particularly employees without bank accounts.[2] These employees generally incur high fees for cashing payroll checks and then incur additional costs when purchasing money orders to pay bills or when traveling to a payment location to pay in cash. Several retail organizations now recognize the public demand for reloadable prepaid debit cards, and are widely offering general purpose cards to the public and specifically marketing them as payroll devices. If an employer does not itself offer payroll cards, an employee can obtain a general purpose card and ask his or her employer to set up direct deposit into the card account. *The debit card account appears to the employer to be a conventional bank account, and a*

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[1] These states are Colorado, Delaware, Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Virginia and West Virginia. In addition, a bill relating to payroll cards is currently awaiting the governor's signature in Florida.

[2] Electronic wage payment also reduces risks associated with lost, stolen or fraudulent pay checks, and facilitates delivery of wages during natural disasters. Employers who implement electronic wage payment often experience a significant cost savings as well as increased employee morale. Electronic wage payment also is an attractive option for employers who are looking to become more environmentally conscious.

conventional direct deposit. However, any requirements established in law for the protection of workers in the context of employer-sponsored payroll card programs (such as requiring one free transaction per pay period) do not apply.

Employer-sponsored paycard programs are far more likely to have better terms and conditions and lower costs. State wage and hour laws and regulations can define appropriate requirements and conditions that apply to employers who wish to offer such cards. These restrictions must be reasonable, however. Otherwise, employers would simply not offer pay cards and employees will only be able to get a prepaid debit card by purchasing one at a retail or check-cashing store on substantially worse terms.

Payroll cards provide access to net pay in a far safer, more secure and less expensive way than paper paychecks.[3] Notwithstanding the advantages of payroll cards, we ask only that they be treated the same as any other method of wage payment. Whatever method of wage payment is used, employers should be responsible for ensuring that workers can obtain the full amount of their pay without cost, at least once each pay period. Beyond that, employers should not be expected to assume responsibility for the discretionary banking costs of their workers. No other state requires more than one free withdrawal each pay period. For example, the recently enacted Colorado law allows an employer to deposit an employee's wages on a paycard, so long as the employee is provided free means of access to the entire amount of net pay at least once per pay period. A regulation such as this would ensure that Utah workers paid with a paycard can get 100% of their pay without a fee. The proposed rule, by contrast, does not ensure the same result. Under this rule, an employee could be given, for example, two free ATM transactions, and would not be able to get their wages down to the penny since ATMs do not dispense dollars and change. [For a low wage worker, every penny counts.]

If two free withdrawals are required (depending on how this is defined), paycard providers and employers may well elect not to offer beneficial programs in Utah that are offered to employees in other states.

At the very least, we urge the Commission to clarify what is meant by two free *uses* of the paycard each pay period without fees.[4] While providing two free ATM withdrawals would likely be prohibitive, most payroll card programs already provide employees with a number of ways of accessing their wages each pay period without cost. In addition to providing one free ATM transaction per pay period, employees who use branded cards (e.g., Visa, MasterCard, or Discover) may request the full amount of the card in cash from any bank that displays the card logo. In addition the use of branded cards for "signature" (non-PIN) transactions are often free. Many card programs also offer courtesy checks that can be written for the full amount of the card balance, and most card programs permit workers to transfer the amount on the card to a bank account or receive cash back from purchases, without fees. Accordingly, if the Commission insists on two free uses, the APA recommends that the provision be revised as follows:

> Each pay period, the employee must be provided with one free ATM withdrawal, as well as one other means of access without fees. Permissible means of access

[3] Moreover, when paper paychecks are used, the employer continues to have access to the funds until the check is negotiated. In contrast, when payroll cards are used, the funds are transferred to the employee on payday regardless of whether the employee desires to access the funds.

[4] We also noted that the analysis accompanying the proposed regulation states, "because the proposed rule does not permit any costs associated with use of a pay card system to be assessed to employees, there will be no compliance costs for employees." The proposed regulations themselves appear to recognize that fees may be charged after two free uses each pay period.

include, but are not limited to, over the counter bank teller transactions, convenience checks, and cash back from point of sale transactions as well as designated retail purchase transactions.

2. **The employee must be able to use the paycard for full payment of wages on the designated payday or within 6 months thereafter.**

It is unclear what is meant by this provision. To the extent that the Commission is concerned that payroll cards will expire like certain gift cards, this simply is not the case. Employees will have full access to their wages for well beyond six months, unless and until the funds are considered abandoned property under the state's escheatment law. *See*, Utah Code § 67-4a-212. At that point, the employee can access his or her wages as he or she would access other abandoned property.

To the extent that this provision is attempting to limit dormancy fees, the proposal should be revised to remove this provision entirely or at least to expressly state this intent. As you know, many programs impose dormancy fees if an account remains inactive for a specified period of time. These are the same fees that are imposed when wages are deposited into an employee's personal bank account either through direct deposit or on a paycheck and the account remains inactive for the stated period of time. Again, there is no reason to treat payroll card accounts any differently than other accounts.

In addition it is unclear what responsibility employers would have for company employees transferring into the State of Utah. Would they be responsible for stopping the employee's use of the program? If an employee is hired from another state and they bring a paycard account with them, is the Utah employer responsible for determining if they are using a paycard and preventing its use in Utah?

Conclusion

We appreciate your serious consideration of the above comments as you draft final regulations relating to payroll cards. If you have any question about our comments, please feel free to contact Cathy Beyda at (408) 973-8215, Pete Isberg at (610) 827-1591, or Bill Dunn at (202) 232-6889. We would welcome the opportunity to discuss these issues with you in more detail.

Sincerely,

Cathy Beyda, Esq.
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