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ANGELA BRADSTREET, STATE LABOR COMMISSIONER

ROBERT R. ROGINSON  
Chief Counsel

July 7, 2008

Donald J. Mosher, Esq.  
Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, New York 10022*Re: Money Network Checks – Payment of Wages Under Labor Code §212*

Dear Mr. Mosher:

This letter is in response to your letter dated November 1, 2007, requesting an opinion from this office on the question whether the use of a “Money Network Check” for payment of wages to California workers complies with California law and, specifically, Labor Code § 212 which governs the means of payment for wages.

You described the check cashing procedure which is used as part of a program offered by Money Network, a subsidiary of First Data Corporation, which provides employers with payroll distribution services including payment of wages by check or debit paycard. Although you refer generally to a “debit paycard” alternative as it relates to Money Network Services provided by your client, your request addresses and provides information regarding the “Money Network Check” and this letter limits its analysis to the specific question presented in your letter.

In essence, your letter and subsequent conversations with our office indicate the following facts relating to the wage disbursements using Money Network Checks.<sup>1</sup> Pursuant to an irrevocable trust agreement, employers (clients of Money Network) deposit employee payroll into a pooled account established for the benefit of employees at MetaBank, a federal savings association and FDIC member. The trust agreement is between the employer and First Data Trust Company, LLC, as trustee, and the employees as beneficiaries. Employees are provided a supply of un-denominated Money Network Checks issued by MetaBank which can be replenished at any time if lost or stolen. On payday, an employee calls the Money Network service at a toll free number to obtain authorization information (issuer and transaction numbers). The number is then written in spaces provided on the face of the check and the check is not valid without such authorization information. To obtain his or her pay as cash, the employee makes himself or herself the payee.

<sup>1</sup> You indicated that Money Network Checks was formerly called TransChecks which have been around for over 15 years with over 3.5 million cashed annually.

The Money Network Check can be cashed (one check free of fee per payroll period) at the "ACE Cash Express" address in California designated on the face of the check, or at any other ACE or Wal-Mart location in California which is also stated on the check. Money Network currently has formal arrangements with these businesses to provide check cashing service for Money Network checks without a fee for at least one transaction per pay period. Money Network can augment or replace the check cashing locations or network of locations and will have formal arrangements with new locations/networks to ensure that Money Network Checks continue to be cashed without a fee for employees at least once per pay period.<sup>2</sup> You also clarified that an employee is *not required* to use Money Network Checks (or the companion debit card) and any employee may elect to receive their payroll by direct deposit in an account at a bank or credit union of their choosing.

Your letter described the Money Network Service as also providing convenience and protection of payroll funds. The current locations for cashing the checks without fee consists of approximately 140 current ACE and 170 Wal-Mart locations in California convenient to work, home, or shopping venues. The procedure is described as secure since payroll funds are irrevocably deposited (the employer relinquishing all claims to the payroll funds) in the pooled account at MetaBank and the funds are FDIC insured and maintained for the benefit of employees. Once an employee completes the authorization process, the authorized funds are immediately transferred from the pooled account to a MetaBank clearing account maintained for the benefit of holders of the authorized checks and against which the checks are drawn.

California Labor Code §212 states, in relevant part:

(a) No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:

(1) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment.

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<sup>2</sup> An employee can get their full wages with no encashment limit in one transaction without fee at any ACE location in California. Although your letter indicates that Wal-Mart has a \$1,100 limit, you subsequently clarified that the limit has increased to \$1,500 for a seven day period which is well below the average check of \$376. You also indicated that Wal-Mart has, at its discretion, cashed checks over \$1,500 demonstrated by the fact that less than 3% of checks cashed nationwide exceed \$1,500, and approximately 1/3 of those checks are cashed at Wal-Mart. For the small percentage of employees who might have wages exceeding the limit at Wal-Mart, such employees can receive their full wages at any ACE location.

(2) Any scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money.

...

(c) Notwithstanding paragraph (1) of subdivision (a), if the drawee is a bank, the bank's address need not appear on the instrument and, in that case, the instrument shall be negotiable and payable in cash, on demand without discount, at any place of business of the drawee chosen by the person entitled to enforce the instrument.

A plain reading of Labor Code § 212(a) establishes a broad prohibition against payment of wages by (non-cash) methods using instruments *unless* such instrument complies with the conditions stated in subsection (a)(1), and further, is not "[a]ny scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money" as proscribed in subsection (a)(2). Additionally, Labor Code §213 states specific limitations on § 212 and provides, among other things, that § 212 does not prohibit an employer from performing a direct deposit of wages in an account at any bank, savings and loan association, or credit union. (Labor Code § 213(d))<sup>3</sup>

It is clear from the language in Labor Code § 213(d) that the Legislature specifically authorized wage payments using direct deposit and prescribed the conditions for such payment method. Section 213 cannot be reasonably interpreted, however, to constitute the *sole* method of payroll distribution which involves payment using bank deposits. Indeed, such interpretation would have the unintended effect of nullifying the general provisions in § 212. This division long-ago opined that employees who do not agree to direct deposit wage payment (thus failing to comply with § 213) must be paid in accordance with § 212. (O.L. 1987.01.07). The same reasoning would logically extend to a wage payment procedure which does not otherwise comply with the direct deposit provisions in § 213, i.e., the procedure must then comply with § 212. Thus, the fact that a specific wage payment procedure is authorized (i.e., not prohibited) under § 213, does not limit another type of wage payment procedure if it otherwise complies with § 212.

It is significant that the program does not mandate employee participation in the Money Network Service and that it is designed to provide an *alternative* for employees receiving their

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<sup>3</sup> Labor Code §213 states:

Nothing contained in Section 212 shall:

...

(d) Prohibit an employer from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association, or credit union of the employee's choice with a place of business in this state, provided that the employee has voluntarily authorized that deposit. If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.

wage payment.<sup>4</sup> Employees are also given the option of having their pay direct deposited into an account of their choosing at a bank, savings and loan association, or credit union of their choosing. Although a review of all the alternatives available to employees of your clients is beyond the scope of your inquiry, it deserves noting that any wage payment procedure, including direct deposit procedures, must comply with the applicable conditions set forth in Labor Code §§ 212 and 213 in order to be permissible under California law.

In the described check program, it is evident that the critical point for purposes of wage payment lies in the employees accessing their payroll funds on the scheduled pay day. The arrangements made between the employer and Money Network for deposit of the payroll funds into the pooled account at MetaBank are analogous to other arrangements made by employers with traditional payroll service providers who act as agents for the employer using banks for purposes of distributing payroll.<sup>5</sup> While the Labor Code does not purport to regulate the specific arrangements between employers and payroll service providers, both an employer and, under the express language in Labor Code § 212—their *agent*, must comply with its requirements.

Labor Code § 212(a)(1) first provides that “[a]ny order, check or draft, note, memorandum, or other acknowledgement of indebtedness...” may not be issued unless it is negotiable and payable in cash, on demand, without discount. Notably, the statute neither prescribes nor addresses the manner for making the payment instrument. The Money Network Check is an instrument made negotiable by the employee obtaining an authorization (issuer and transaction numbers) from Money Network’s customer service for an amount up to the full wage amount due.<sup>6</sup> The funds previously deposited with the FDIC-insured bank are funds fully available and accessible to employees on the scheduled payday and the employer has no claims to any deposited payroll funds. The requirement of the program that the employee contact Money Network for authorization for the amount sought to be cashed protects both the employee and employer by ensuring that the proper wage amount is paid to the appropriate employee at the proper time for the applicable pay period.

The fact that the employee has a role in finalizing the instrument is no more burdensome than having to appear at a place to obtain one’s paycheck or provide identification verification to an employer or payroll service in order to receive wages in person. As previously stated, the

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<sup>4</sup> The optional nature of the Money Network Service is mandated under federal laws. Specifically, the Federal Reserve Board’s Regulation E states: “*No financial institution or other person* may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of governmental benefit.” (12 CFR §205.10(e); italics added)

<sup>5</sup> Of course, this opinion does not render any determination or opinion regarding Money Network’s compliance with federal or state banking laws or other applicable laws relating to financial institutions.

<sup>6</sup> Pursuant to the Uniform Commercial Code governing negotiable instruments adopted in California, a “check” includes “...a draft, other than a documentary draft, payable on demand and drawn on a bank...” (Comm. Code §3104(f)) Further, an instrument is a “draft” if it is an order to pay and a “note” if it is a promise. (Comm. Code §3104(e)) The sample draft of the Money Network Check contains the language “pay to the order of” and thus the instrument is a “check.”

employee's participation in the program is voluntary so that employees who do not wish to have such role in obtaining the required authorization cannot be required to do so. Further, the employee's role does not (and cannot) diminish the obligation of the employer, through its agent, to effectively discharge its wage payment obligation. The agent must promptly provide the employee with authorization information necessary to render the check instrument negotiable and payable upon demand, without discount, at a place of business in the state.<sup>7</sup> Thus, the employer must bear any risks for any problems or delays resulting from the check cashing *procedure* if a violation is determined under particular circumstances.

It is also significant that there is no fee charged to the employee for one transaction per pay period which is consistent with the statutory language that such instrument be payable on demand and without discount. Since the check allows an employee to draw all of his or her wages with an instrument negotiable in cash, on demand and without discount for one transaction per pay period, the instrument effectively satisfies the first requirement stated in Labor Code § 212(a)(1).

Section 212(a)(1) further requires that the instrument be payable "at some established place of business in the state, the name and address of which must appear on the instrument..." This requirement applies even if the instrument is drawn on an out-of-state financial institution. (DLSE Enforcement Policies & Procedures Manual, §9.1.2) The face of the Money Network Check indicates that it may be cashed at ACE Cash Express at a specified address, and further, states "Or any ACE or Wal-Mart location." As previously stated, your letter indicates that there are approximately 140 current ACE and 170 Wal-Mart locations in California, and thus, employees are not limited to one pay-out location. In providing an established place of business in California where the check may be cashed on the face of the check, the instrument meets this statutory requirement even though the instrument is drawn on an out-of-state bank.

Labor Code § 212(a)(1) lastly states that "...at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment." Your letter states that funds are maintained in the pooled account at MetaBank for the benefit of employees pursuant to an irrevocable trust agreement where the employer relinquishes any right to deposited payroll funds. Three conditions are listed which describe distributions of payroll funds: (i) the payroll funds are reduced to zero by the employee, (ii) funds are disbursed to the employee by the trustee in accordance with the terms and conditions of the Money Network Service, and (iii) funds are distributed as otherwise required by applicable law (e.g., abandoned property requirements). Additionally, you stated that once an employee completes the authorization process for a check, the relevant amount of funds are immediately transferred from the pooled account to a bank-owned clearing account maintained for the benefit of the holder of the authorized check.

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<sup>7</sup> An employer must continue to recognize that ultimate compliance responsibility for timely and prompt payment of wages to its employees lies with the employer under California wage payment laws notwithstanding arrangements made for payroll distribution using agents or other third parties. The importance of this obligation is underscored by Labor Code §219(a) which prevents the contravention in any way of any of the wage payment provisions, including §212, by any private agreement, whether written, oral, or implied.

Two of the three described conditions result from distribution of funds by or to the employee, and the third condition pertains to distributions required by law. There is no mention in the letter of the sufficiency of the funds for at least 30 days or the specific terms or conditions of the Money Network Service which results in disbursement of funds to the employee, by the Trustee. You have since informed us, however, that payroll funds deposited are fully available and accessible for at least 30 days from the pay day for any of the above stated conditions. Given the irrevocable payment by the employer to the account established for the benefit of employees and the maintenance of sufficient funds to cover full payment of wages as well as the drawer's *arrangement or understanding* with the drawee (bank) for payment to employees up to the full amount of their wages due, the procedure satisfies the sufficiency of funds requirement in Labor Code § 212(a)(1).<sup>8</sup>

It is worth noting that the Money Network Check is drawn against funds in a bank. The bank is thus the drawee (the person or entity ordered in a draft to make payment).<sup>9</sup> As previously quoted above, Labor Code §212(c) specifies that notwithstanding §212(a)(1), if the drawee is a bank, "the bank's address need not appear on the instrument and in that case, the instrument shall be negotiable and payable in cash, on demand, without discount, at any place of business of the drawee chosen by the person entitled to enforce the instrument." Here, the bank's address is listed on the instrument.

Lastly, while this response addresses use of the Money Network Check under the requirements of Labor Code § 212, it should be emphasized that the companion requirement for distribution of an itemized wage statement required under Labor Code § 226(a) must also be followed. You informed us that the Money Network Service covers only distribution of funds and not information. On the scheduled pay day, employees receive an itemized wage statement (pay stub) from the employer as they would otherwise receive under direct deposit which normally involves a combination of paper with electronic option. Money Network offers an optional service, however, for employers where it distributes pay stubs electronically. This agency has addressed this subject in a recent opinion letter (O.L. 2006.07.06) which provides our interpretation of electronic distribution of itemized wage statements under Labor Code §226(a) and I refer you to that letter.

The Money Network Check appears to provide a prompt and convenient method of wage payments to employees who have full access to wages on scheduled pay days. The success of the

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<sup>8</sup> Labor Code §212(a)(2) prohibits the use of any "scrip, coupon, card, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money." Under the described program, the check, once authorized, is a negotiable instrument payable in cash and is payable up to the full amount of his wages. The fact that there are other options for employees to choose such as to withdraw a lesser amount or have certain amounts transferred to other accounts does not render the instrument non-negotiable nor redeemable for something otherwise than in money. There is a ready and immediate means for an employee to withdraw their full wages as cash on the established pay day. The employee has full control of his wages and since the check is a negotiable instrument, the Money Network Check can be transferred or deposited to the same extent as any other payroll check to satisfy obligations of an employee if he or she chooses to do so.

<sup>9</sup> See Commercial Code §3103(a)(2).

Donald J. Mosher, Esq.

July 7, 2008

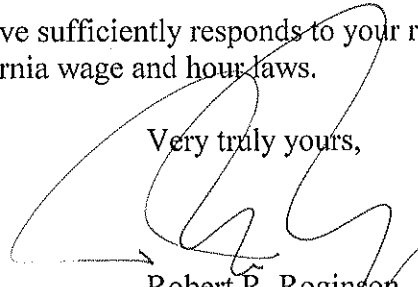
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described procedure, in practice, will of course require that employees are fully informed of the service and procedures and that it is presented as an *alternative* method for wage payment for which their participation is optional.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

I hope that the above sufficiently responds to your request and I thank you for your interest in compliance with California wage and hour laws.

Very truly yours,



Robert R. Roginson  
Chief Counsel

cc: Angela Bradstreet, Labor Commissioner