STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4863 Fax: (415) 703-4896

MILES E. LOCKER, *Chief Counsel*

July 19, 1999

Senator Richard K. Rainey
California State Senate
1948 Mt. Diablo Blvd.
Walnut Creek, CA 94596

Assemblywoman Lynne Leach
California State Assembly
800 S. Broadway #304
Walnut Creek, CA 94596

Re: **Electronic Itemized Wage Statements**

Dear Senator Rainey and Assemblywoman Leach:

This is in response to your letter dated May 14, 1999 to Stephen Smith, the Director of the Department of Industrial Relations, on the issue of the legality of electronic itemized wage statements under Labor Code section 226. Initially, please accept my apologies for the delay in getting this response to you.

The particular question that you pose was initially presented to the Division of Labor Standards Enforcement ("DLSE") by a letter, dated August 4, 1998, from Roberta Romberg on behalf of ProBusiness Systems, Inc., a company that provides payroll services to other businesses. According to that letter, ProBusiness sought to establish a system of "paperless payroll services," at the option of its business clients, incorporating the use of electronic pay statements. The electronic form of the paycheck (or direct deposit advice) would include all of the information required by Labor Code section 226, and would be available to the employees through the web site on or before the pay date.

Specifically, ProBusiness proposed to set up a system that would represent each worker's paycheck electronically, with the electronic representation of each paycheck available from an Internet web site managed by ProBusiness as a service to its clients. According to this letter, the web site would be secure using industry standard security and encryption technology. Employee access would be controlled through the use of unique employee identification ("ID") and confidential personal identification ("PIN") numbers. So-called firewalls would be implemented to prevent unauthorized access to this information.

The letter further stated that the website would be accessible using properly configured web browsers, and that access would be available both through terminals located at the worksite and home computers, with minimum configuration requirements to be made available to employees to enable them to configure their home computers to allow for access. The service would be available for access 24 hours a day, seven days a week, with the exception of occasional downtime to permit standard system maintenance. At work, every employee would have access to either an individual or network printer, to enable each employee to obtain a printout of the electronic check image, at no cost to the employee.

The letter presented us with three questions. First, whether the proposed system described above satisfied the requirements of Labor Code sections 226 and 1174. Second, we were asked whether employers using this service could mandate the conversion to electronic pay statements and entirely eliminate paper versions of paychecks, direct deposit advices, and itemized wage deduction statements. Finally, we were asked whether compliance with these Labor Code provisions require employee access to a private or dedicated printer, as opposed to a network printer.

By letter dated November 10, 1998, DLSE staff counsel Michael S. Villeneuve answered the questions posed by Ms. Romberg's letter. To the extent that the proposal suggested that an employer could escape from the obligation to provide an employee with a hard copy of the itemized wage deduction statement, Mr. Villeneuve concluded that the proposal did not meet the requirements of Labor Code sections 226 and 1174. Specifically, Mr. Villeneuve wrote that an employer cannot "mandate conversion [to electronic representations] and eliminate the paper version entirely."

This lead to another letter to DLSE on behalf of ProBusiness, dated February 22, 1999, and authored by Kenneth B. Stratton. This letter stated that based upon the concerns expressed in DLSE's initial response, ProBusiness has revised its proposal to offer electronic itemized wage statements to its California clients. Under the revised proposal, employees who do not wish to receive their wage deduction statements via electronic representations will continue to receive such statements in their traditional, paper form. Likewise, any employee lacking free Internet access, or free access to both a computer terminal and a printer at the workplace will continue to receive paper itemized wage statements. Moreover, under the revised proposal every employee will always have the option of requesting paper paychecks and paper itemized wage deduction statements, and every employee may therefore switch back, at the employee's request, from electronic representations to traditional paper.

Also, under the revised proposal, ProBusiness will maintain on its website each employee's complete payroll information for more than one year, and a year-end summary for each employee for three years. Finally, according to this letter, ProBusiness' clients will maintain records of deductions from payment of wages "in ink or other indelible form" at central locations within the State of California for at least three years as required by Labor Code sections 226 and 1174.

This letter was followed by your letter, dated May 14, 1999, to Director Stephen Smith, in which you correctly note that under the revised proposal, "any employee who wishes to receive a paper itemized wage statement may do so."

Labor Code §226(a) provides, in relevant part:

"Every employer shall semimonthly, or at the time of each payment of wages, furnish each of his or her employees either as a **detachable part** of the check, draft or voucher paying the employee's wages, **or separately** when wages are paid by personal check or cash, an itemized **statement in writing** showing: (1) gross wages earned; (2) total hours worked by each employee whose compensation is based on an hourly wage; (3) all deductions; provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (4) net wages earned; (5) the inclusive dates of the period for which the employee is paid; (6) the name of the employee and his or her

social security number; and (7) the name and address of the legal entity which is the employer.

The deductions made from cash payments of wages shall be **recorded in ink or other indelible form**, properly dated, showing the month, day, and year, and a copy of the statement, or a record of the deductions, shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California." (emphasis added.)

Labor Code §1174 requires employers, among other things, to "keep at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by, and the wages paid to, employees employed at the respective plants and establishments, and which shall be kept in accordance with rules established for this purpose by the [Industrial Welfare] commission, but in any case shall be kept on file for not less than two years." Each of the Industrial Welfare Commission wage orders contains a section dealing with required payroll records, which states that "all required records shall be in the English language and **in ink or other indelible form**, properly dated, showing month, day and year, and shall be kept on file for at least three years at the place of employment or at a central location within the State of California. . . ." (see, e.g., IWC Order 4, para. 7, emphasis added.)

Applying the facts that have been presented to us to these statutory requirements, it is our conclusion that ProBusiness' proposal to provide employees with wage deduction statements in an electronic form, **as revised in accordance with the letter dated February 22, 1999**, meets the requirements of Labor Code sections 226 and 1174, subject to the guidelines discussed below.

The word "detachable" as used in Labor Code section 226 means that the wage deduction statement must be capable of being detached, disengaged or removed from the paycheck; that is, it must be capable of being made separate from the paycheck. The purpose behind this is quite simple - - it is intended to ensure that the required information will not be lost to the employee once the paycheck is deposited, and that the employee will have a simple way of keeping this information for his or her own records. The phrase "statement in writing," as used in section 226(a), "includes any form of recorded message capable of comprehension by ordinary visual means." (see Labor Code §8)

This definition includes electronic representations that are readable on a computer screen and printable by using an attached printer. The phrase "recorded in ink or other indelible form," found at Labor Code §226(a) and in paragraph 7 of the various IWC orders, means that these records, which must be kept on file by the employer for at least three years, must be maintained in a printed form, or in an electronic form that cannot be tampered with or altered once the information has been recorded, and that can be printed in an indelible format upon request of the employee or the DLSE. This conclusion is consistent with the obvious purpose behind the requirement of "ink or other indelible form," namely, to prevent an employer from altering previously generated records.

By letter dated July 26, 1995, the DLSE's former chief counsel, H. Thomas Cadell, Jr., concluded that the use of electronically generated and recoverable payroll data will satisfy the requirements of Labor Code §1174 if all of the following conditions are present:

1. The worker has personal access at all reasonable hours to a terminal, provided at the employer's expense, where the information may be accessed;

2. The terminal has a printer which may be used by the worker to produce a hard copy of his or her payroll records; and

3. The information available through the computer meets the requirements of section 1174 and the applicable IWC Order.

And of course, although not stated in the letter of July 26, 1995, the required records must be maintained by the employer for no less than three years, at the place of employment or at a central location in the State of California, and must be made available to the employee and to DLSE upon request.

These same criteria apply in determining the legality of electronic deduction statements under Labor Code §226. But section 226 differs from section 1174 in that it requires that the employer not only maintain certain payroll records (and make those records available to employees upon request), but also, that these records be **"furnished to", or provided to** each employee each time wages are paid. Again the purpose behind section 226 is to ensure that employees have the ability to maintain their own set of pay records. This purpose would be subverted by a denying employees the option of receiving a traditional paper wage deduction statement instead of an

electronic representation. Employees who are hesitant to use computers, or who have privacy concerns about electronic data, or who simply believe that their own record keeping needs would be better served by traditional paper wage deduction statements, must have the option, under Labor Code section 226, to receive the information in a non-electronic form. In that ProBusiness' revised proposal meets this concern, it does not run afoul of section 226.

However, there is one aspect of the revised proposal that must be modified. According to the February 22, 1999 letter, ProBusiness will maintain on its website each employee's "complete payroll information for more than one year," and "year-end summaries for each employee for three years." Employees who do not opt-out from the system of electronic wage statements may or may not choose to print each electronic statement at the time it is generated. Many employees may decide not to expend the time and energy (however minimal an amount that may be) needed to download and print the data each pay period, and instead, will rely on the data's accessibility in the computer system should they ever feel the need to later obtain a hard copy of prior wage deduction statements. Since this information is required to be maintained by the employer for at least three years, and since California law provides for a three year statute of limitations for actions based on statute, we believe that an employer who elects to comply with Labor Code §226 by offering electronic wage deduction statements must make **all** of the information required under that statute available to employees for downloading and printing for no less than three years; a "year-end summary" is not sufficient.

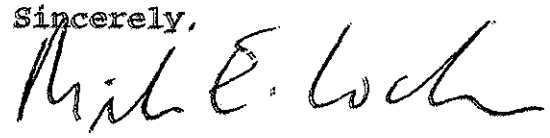
Finally, we do not believe that each employee must have access to his or her own personal, dedicated printer. However, certain privacy concerns do come into play. If printing of electronic data is to be accomplished through network printers, the employee must be situated close enough to the network printer to eliminate any risk that the data, once printed, can be taken by someone else. Also, the network printer (like the computer and the website) must be secure so as to prevent others from printing the employee's personal data. Furthermore, the network printer must be available for printing the wage deduction statement at all reasonable hours throughout the day with no more than a minimal delay, so that the employee is not discouraged from having the data printed.

We believe that ProBusiness' revised proposal, as modified by the above guidelines, meets the requirements of Labor Code

section 226, while striking a careful balance between employers' interests in seeking to take advantage of less expensive electronic methods of providing payroll data, and workers' interests in obtaining their payroll records in whatever manner that each worker finds to be most convenient and accessible.

Thank you for allowing us the opportunity to revisit this issue, and for your interest in California labor law.

Sincerely,



Miles E. Locker
Chief Counsel, DLSE

cc: Stephen Smith, Director, Department of Industrial Relations
Marcy Saunders, State Labor Commissioner
Rich Clark, Chief Deputy Labor Commissioner
Nance Steffen, Assistant Labor Commissioner
Tom Grogan, Assistant Labor Commissioner
Greg Rupp, Assistant Labor Commissioner
All DLSE Attorneys
Kenneth B. Stratton, Esq.
Roberta V. Romberg, Esq.
Melanie C. Ross, Esq.
Shari B. Posner, Esq.