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ANGELA BRADSTREET, STATE LABOR COMMISSIONER

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July 7, 2008

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Crown Center
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Re: Payroll/Debit Cards – Payment of Wages Labor Code §§ 212 and 213

Dear Messrs. Morris & Schwallie:

This letter is in response to your respective letters requesting an opinion from this office on the question whether the use of “payroll debit cards” (American EPay) and “paycards” (Hewitt Associates) through your respective company’s payroll distribution services complies with California law, and specifically Labor Code § 212 which governs the manner of payment for wages.

In both your respective letter requests and subsequent conversations with our office, the wage payment methods described use of respective payroll cards which are issued pursuant to agreements between your companies and national banks.¹ Employers (clients of your services) deposit employee payroll using a direct deposit method into individual employee accounts at a

¹ The term “payroll card” will be used to describe both types of cards used by the companies discussed herein. The payroll card is a type of stored value (or prepaid) card which contains or represents an amount of pre-loaded value. Examples of prepaid cards include gift cards, phone cards, travel cards. Stored value cards can be structured under either a closed system (accepted at a single merchant or entity) or an open system (accepted by multiple merchants or entities), the latter which requires a payment systems network for collecting and processing. Stored value cards can be structured to function like debit cards. A debit card is a payment card that debits a designated bank account upon settlement of a transaction (e.g. to withdraw or transfer funds such as in retail purchases, ATM withdrawal) which is authorized by the user by signature or by entering a personal identification number (PIN). Payroll cards are usually proprietary but may also be “nationally branded” with a Visa or MasterCard brand logo which allows not only ATM or specific merchant withdrawals but also allows for purchasing and receiving cash from numerous merchants or other entities like a traditional debit card. The payroll cards described in this opinion are open system, branded cards utilizing debit card features.

bank which is an FDIC member. Employees are provided a plastic card which is magnetically or electronically encoded with account information which allows employees access to funds from their respective accounts. On the scheduled pay day, the employee has immediate access to their full wages (one transaction without fee per payroll period). Employees are *not required* to use your pay distribution programs and may elect to receive their payroll by direct deposit in an account at their own bank or credit union.

Your letters described the cards as a convenient and prompt means of access to an employee's full wages due and payable on a scheduled pay day. Under the programs offered by the respective companies, the payroll card may be used at any VISA-member financial institution. While there are program differences between the two payroll card systems, both have the above-described major features in common.

This analysis first states the major statutory provisions for payment of wages and this agency's previous interpretations regarding earlier similar programs followed by a discussion of recent developments in federal regulation of payroll card accounts. The analysis will then analyze the described programs under the relevant wage payment provisions.

Requirements Regarding the Manner of Payment of Wages

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.

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

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),² 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).

Labor Code § 213 states specific limitations on §212 and provides, *inter alia*,

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.

DLSE previously opined that a program conceptually similar to the instant proposals complied with the requirements of the Labor Code. (O.L. 1994.02.03-1) In that opinion letter, the Citibank PayTM service was described as an electronic alternative for payment of wages to employees where employees voluntarily participated in the wage payment program. Under the program, an employer offers the service to its employees who apply to open a PayTM account. Upon acceptance of the account application by Citibank, the employee would be issued a PayTM card and the employee’s pay would be *directly deposited* to the employee’s account. Thereafter, the employee can access his or her funds through use of the pay card using a personal identification number (PIN) at any of the hundreds of ATMs and point-of-sale (POS) locations.

The 1994 opinion letter analyzed the Citibank program by reading Labor Code § 213 in light of the provisions of Labor Code § 212. Significantly, the letter stated that PayTM card “would be *the instrument which is negotiable and payable in cash on demand*, without discount at an established place of business (i.e., ATMs)...” ((O.L. 1994.02.03-1, p. 2) The letter concluded that, subject to Citibank’s waiver of any right to extraterritorial service for subpoenas for bank records regarding the accounts, DLSE would be able to opine that the service “complies with California law.” (*Id.*, at p.3) Similarly, DLSE previously opined that a payroll service program

² DLSE has historically viewed the wage payment laws as requiring payment of wages in cash or by instrument negotiable in cash without discount upon demand. (DLSE Enforcement Policies and Interpretations Manual, § 9.1.1) The Labor Code does not specifically define the terms “instrument” or “negotiable” which are terms used in Labor Code § 212(a). The ordinary meaning of the word “instrument” is “a writing or document” (See Black’s Law Dictionary, 5th ed., 1979, p. 720) The word “negotiable” means “[l]egally capable of being transferred by endorsement or delivery. Usually said of checks and notes and sometimes of stocks and bearer bonds.” (*Id.*, p. 933), or, “legally transferable to another by endorsement or by proper delivery (said of promissory notes, checks, etc.)...” (Webster’s New World College Dictionary, 4th ed, 2005, p. 964).

offered to companies employing over-the-road truck drivers which allows all or any portion of wages to be transferred by *direct deposit* to the drivers bank account and such wages could be distributed to the driver on the road (both through ATM machines or drafts without incurring charge) met the requirements of Labor Code § 212(a). (O.L. 1997.10.21)

While the conclusions of the described opinion letters appear appropriate, clarification of the analysis is warranted given the language in both Labor Code §§ 212 and 213 as well as developments in the law and practice regarding the use of payroll card programs.

Developments in Payroll Card Regulation

The technology explosion in the last 20 years has often outpaced the ability of federal and state governments to keep up with private industry advances in conducting business. Although the use of electronic “payroll cards” has been around for some time (as illustrated by the above described opinion letters), it has only recently been expressly regulated under specific federal law.

The federal Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 et seq., enacted in 1978, provided a basic framework establishing rights, liabilities and responsibilities of participants and consumers involved in electronic fund transfer systems and financial institutions that offer these services. (12 CFR § 205.1(b)) Although EFTA was enacted many years ago, the internet has drastically increased the number of electronic transactions and importance of the Act.

EFTA is implemented and administered by the Board of Governors of the Federal Reserve System (FRB) through “Regulation E” (12 CFR Part 205) which has a primary objective of protecting individual consumers engaging in electronic fund transfers. (12 CFR 205.1(b)) Regulation E broadly defines an “electronic fund transfer” as “any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer’s account.” (12 CFR § 205.3(b)). The most common types of covered transactions are those involving *debit cards*, *direct deposits*, ATM transfers, and *preauthorized debits* from a consumer’s bank account, and point-of-sale transfers. (*Id.*, italics added) Regulation E provides for initial and subsequent disclosures, issuance of access devices, liabilities of consumer for unauthorized transfers, changes in terms and required notice, receipts/statements, pre-authorized transfers, error resolution procedures, and enforcement by federal agencies.

Prior to July 2007, EFTA covered only electronic fund transfers in and out of a *consumer’s personal* bank account and not to a business account. Effective July 1, 2007, the FRB expressly made electronic “payroll cards” subject to the EFTA. A covered account now includes a “payroll card account” which is an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer’s wages, salary, or other employee compensation (such as commissions) are made on a recurring basis, whether the account is operated or managed by the employer, a third party payroll processor, a depository institution or any other person...” (12 CFR § 205.2(b)(2))

It is evident that the payroll card and its electronic-based means of accessing and transferring funds is now clearly aligned with other electronic transaction or payment methods such as debit cards and direct deposits covered under FRB's Regulation E requirements. Moreover, the activities regulated under EFTA are distinguishable from the rights, obligations, and remedies available for negotiable instruments which are largely governed by Article 3-Negotiable Instruments of the Uniform Commercial Code (UCC).³

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, and further, that Labor Code § 212 cannot be read to prohibit such wage payment method. Accordingly, the conditions for payment of wages using a negotiable instrument have been viewed as independent of the conditions for payment by direct deposit in financial institutions. (See O.L. 1996.11.12 [payment by check delivered directly to the worker is different from a direct deposit in a banking-type institution which is why the Legislature provided one rule for one method and another rule for the second].)

The payroll card programs utilize *both* a direct deposit of wages under an employer sponsored service which is beyond the traditional payment into an employee's personal bank account *and* a means of access to those wages using an electronic card. Based upon the described developments in federal regulation of payroll cards used to pay an employee's wages using direct deposit as a component of a payroll card system and, in view of the distinction between conditions for wage payments by negotiable instrument and direct deposit treated differently under both general laws and wage payment provisions, it is appropriate to first view the subject programs for compliance with Labor Code § 213(d) because the payroll card uses a method of wage payment *involving direct deposit*.

Direct Deposit Under Labor Code § 213(d)

As previously stated, Labor Code § 213(d) expressly authorizes an employer to deposit "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."

³ We could find no authority definitively stating that a "payroll card" or "debit card" is a "negotiable instrument" as defined under Article 3 – Negotiable Instruments in the UCC (codified in California Commercial Code §§ 3101 et seq.) A negotiable instrument is "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order if it is all of the following: (1) Is payable to bearer or to order at the time it is issued or first comes into the possession of a holder. (2) Is payable on demand or at a definite time. (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, ..." (Commercial Code §3104(a)) One federal agency has opined that stored value cards (of which payroll cards are a subspecies) are *not* negotiable instruments since they do not satisfy the definitional requirements under the UCC. (FDIC General Counsel's Opinion No. 8, "Stored Value Cards," 61 Fed Reg. 40490, Aug. 2, 1996 [determining that some stored value systems are "deposits" within the meaning of the Federal Deposit Insurance Act and therefore assessable and qualify for deposit insurance].)

Employee choice is thus a fundamental condition for payment methods utilizing direct deposits under California wage payment law. Also, the optional nature of an employee's participation is further mandated under FRB's Regulation E which 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)

In both described programs, the employer directly deposits payroll into an individual employee's account established at the program bank. Employees continue to have the option of having their pay directly deposited into an account of their choosing at some other financial institution (bank, savings and loan association, or credit union). Since an employee's participation in the payroll card program is optional and provided that the employee has voluntarily and specifically authorized the deposit, the payroll card programs simply provide another *alternative* for employees to receive their wage payments by direct deposit. Thus, the two programs sufficiently satisfy the voluntary requirement in Labor Code § 213(d).⁴

Additionally, Labor Code § 213(d) requires that the deposit be made in any bank, savings, and loan association, or credit union "with a place of business in this state." By its terms, the requirement does not mandate that the deposit be made in California, but simply that the financial institution has a place of business in California. The terms "place of business" is not specifically defined; thus, as with any interpretation of a statutory or regulatory provision, the language must be read as a whole giving words their ordinary meaning. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818) The ordinary meaning of the word "place" in its noun form includes a "building or space devoted to a special purpose [a *place* of amusement]" (Webster's New World College Dictionary, 4th ed., 2005, p. 1099) The noun form of the word "business" includes "the buying and selling of commodities and services; commerce; trade...a commercial or industrial establishment; store, factory, etc....the trade or patronage of customers". (Webster's New World College Dictionary, 4th ed., 2005, p. 1099) When read together, the ordinary meaning of "place of business" denotes a location such as a building, space, or establishment devoted to the purpose or use of conducting one's commerce, trade or patronage of customers.

Given the ordinary meaning of "place of business" as discussed above, an employer's place of business may not be on property it owns or controls and should not be interpreted as limited to such locations. Business is now conducted in many different forms which vary extensively beyond the traditional fixed location. It follows from this recognition and the inherent electronic nature of the bank's direct deposit transaction involving the transfer of pay between a California employer to the bank which maintains an account for the employee, the presence of a branch office of the bank in California is not determinative for establishing a "place of business" for purposes of performing

⁴ Since payroll card accounts are now subject to the FRB's Regulation E, employees are now protected under the federal EFTA for electronic transactions into and out of the account to the same extent as any other consumer using direct deposits at financial institutions which include, but is not limited to, initial and subsequent disclosure requirements, limits on liability, error resolution, changes in terms and required notice, receipts/statements, pre-authorized transfers, etc., as previously described.

direct deposit under Labor Code § 213(d). The bank utilizes electronic fund transfers to both collect the wage deposit from the employer and provide employee access to and actual receipt of cash through VISA-member financial institutions and ATMs throughout California. The banks thus have a sufficient presence of their banking business in California for purposes of Labor Code § 213(d) based upon the banks use of established electronic payment networks for ultimate receipt of wages by California workers at locations in California.

It deserves noting that the two banks in the subject requests (National City and JP Morgan Chase) are “national banks” which are part of the national banking system and regulated by the Office of the Comptroller (OCC) in the U.S. Department of the Treasury. As the administrator of national banks, OCC charters, regulates and supervises all national banks and is charged with ensuring a stable and competitive national banking system. Under OCC regulation, a national bank shall not be considered located in a State solely because it physically maintains technology, such as a server, in that state, or because bank products or services are accessed through electronic means by customers located in the state. (12 CFR § 7.5008) However, our above analysis for determining “place of business” is made for purposes of California’s wage payment provision in Labor Code § 213(d) only, and does not determine that the subject banks are “located” in the State for federal regulatory purposes or any other purpose.⁵

Labor Code § 212 and Other Wage Laws Requiring Prompt and Full Payment of Wages

The compliance of the *direct deposit* aspect of the payroll card program under Labor Code § 213(d), however, only partially resolves compliance with the wage payment laws. Following deposit of wages into the payroll card account, another component part of the payment program—namely effective *access* to the wage funds using the payroll card which results in the employees actually obtaining and using such funds must be determined under other wage payment provisions.

⁵ DLSE recognizes that the OCC has determined that national banks offering payroll cards and other pre-paid payment services are part of the business of banking activities authorized for national banks. (See, OCC Advisory Letter, AL-2004). Also, a national bank is expressly authorized to “disburse to an employee of a customer payroll funds deposited with the bank by the customer, and further may, disburse those funds by direct payment to the employee, by crediting an account in the employee’s name at the disbursing bank, or by forwarding funds to another institution in which an employee maintains an account.” (12 CFR § 7.1011) Federal regulations further state:

(c) State laws. As a general rule, and except as expressly provided by Federal law, State law is inapplicable to a national bank’s conduct of an authorized activity through electronic means or facilities if the State law, as applied to the activity, would be preempted pursuant to traditional principles of Federal preemption derived from the Supremacy Clause of the U.S. Constitution and applicable judicial precedent. Accordingly, State laws that stand as an obstacle to the ability of national banks to exercise uniformly their Federal authorized powers through electronic means or facilities, are not applicable to national banks. (12 CFR § 7.5002(c))

Our analysis of the banks’ place of place of business for wage payment purposes does not stand as an obstacle to the banks’ abilities to perform federally authorized activities through electronic means or facilities. Rather, our interpretation is compatible with the banks’ ability to conduct such activities.

In the subject programs, the payroll service providers (American EPay and Hewitt Associates) have previously procured the specific financial institution where the payroll card account is to held and the providers administer the payroll card programs. The providers effectively act as *agents* of the client employers in discharging the employer's wage payment obligations. The control and oversight of the wage distribution by providers who act as agents of the participating employers thus raise other issues under existing laws. Thus, despite the voluntariness of an employee's participation in the pay card program and his or her authorization for *direct deposit* of wages, the issue of employee *access* to the payroll card account, and specifically any fee imposed for such access, must be further examined due to the relationship of the deposited funds being held by a bank by arrangement with employer's agent.

California has a long history of ensuring the protection of wages for California workers. Specifically, in addition to the conditions for use of wage payments by instruments in Labor Code § 212(a), it is unlawful for an employer or their agent to collect or receive from an employee any part of wages paid (Labor Code §§ 221, 2860), to secretly pay a lower wage while purporting to pay the wage designated by statute or contract (Labor Code § 223), withholding or diverting portions of wages (Labor Code § 224), falsely denying the amount of validity of wages with intent to secure for the employer or any other person any discount of wages (Labor Code § 216(b)). Also, the California Supreme Court has recognized that "it is manifest that wages due belong to the employee, and not to the employer..."; that California courts "have recognized the policy favoring full and prompt payment of wages (*Id.*); and that "wages are not ordinary debts and "because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due. (*Kerr's Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 326)

Also, although Labor Code § 213 prohibits any of the provisions of Labor Code § 212 from being read *to prohibit* wage payment by direct deposit, the conditions in Labor Code § 212(a) which do not relate the direct deposit (which is the authorized substitute for the use of an "instrument" for payment) can be appropriately applied to the payroll card aspect of the program which is the vehicle for receipt of wages. Thus, the requirement that wages be "payable in cash without discount" would be applicable to the use of the payroll cards.

The above statutory provisions manifest a strong public policy that prohibits an employer (or its agent) from imposing conditions or obstacles which interfere with or prevent an employee's from promptly receiving their due wages *in full*. The imposition of a fee in order to readily *access* one's earned and paid wages under a payroll card program which is designed to discharge the employer's wage payment obligations could impermissibly interfere with an employee's receipt of paid wages by creating a financial condition which would have the *effect* of reducing or discounting wages because such fee would be charged against the same account in which wages are deposited.

The payroll card programs reviewed here, however, are described as providing for at least *one transaction per pay period without fee*. By providing one free transaction, the payroll card

programs effectively provide for immediate and free access to an employee's wages in full. The fact that there are other options for employees to choose such as to withdraw a lesser amount does not render the use of a payroll card violative of the employee's right to full and prompt payment of wages. There is a prompt means for an employee to withdraw their full wages as cash on the established pay day by performing an electronic transaction using the pay card at any VISA member financial institution (and under American EPay, at any U.S. Post Office). The employee thus has access to his full wages on the scheduled pay day and thus, the payroll card programs as described to DLSE do not violate the above stated wage payment provisions.

Additionally, with respect to the use of the payroll card, the *other* applicable provisions of Labor Code § 212(a) (not related to the direct deposit provisions in Labor Code § 213(d) or the requirements for an instrument in § 212(a)) requiring that wages be payable at some established place of business in the state and there be at least 30 days of sufficient funds for payment (in the event wages are not immediately accessed by the employee) appear to be satisfied. Employees have full access to their wages in cash at any VISA-member financial institution in California (and nationwide) as well as at any program merchants and designated surcharge free ATMs. The funds deposited into the employee accounts are held for at least 30 days.

Labor Code § 212(a)(2) further 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 deposit by the employer into the employee's account is payable in cash up to the full amount of his or her 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 payroll card as 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 has any freedom to use the card to satisfy other obligations as authorized under the program if he or she chooses to do so.

The payroll cards appear to provide a prompt and convenient method of wage payments to employees who have full access to wages on scheduled pay days. The effectiveness of the described wage payment programs, in practice, will of course require that employees are fully informed of the service and procedures and that it is represented as an alternative method for wage payment for which their participation is optional.

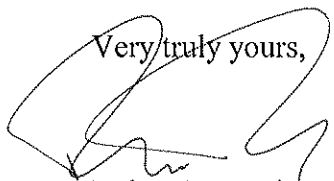
Lastly, while this response addresses use of the payroll card programs under the requirements of Labor Code §§ 212 and 213, it should be emphasized that the companion requirement for distribution of an itemized wage statement required under Labor Code § 226(a) must also be followed. We are informed that on the scheduled pay day, employees receive an itemized wage statement (pay stub) 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 you are referred to that letter.

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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,

A handwritten signature in black ink, appearing to read "Robert R. Roginson", written over a large, loopy scribble.

Robert R. Roginson
Chief Counsel

Cc: Angela Bradstreet, Labor Commissioner