

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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Michael S. Villeneuve, Staff Counsel

November 10, 1998

Roberta V. Romberg
Attorney at Law
Severson & Werson
One Embarcadero Center
suite 2600
San Francisco, CA 94111Re: **Electronic Pay Checks and Direct Deposit**
Labor Code Sections 226 and 1174

Dear Ms. Romberg:

Your request for an opinion letter related to electronic checks, electronic pay statements and direct deposit of pay checks and the requirements of Labor Code Sections 226 and 1174 has been referred to me for response.

Your request states that your client provides a range of payroll services to many companies in the State of California. At the request of several companies who are clients of this company, "paperless" payroll services, including the use of electronically generated and electronically accessible pay statements are being proposed. Under this proposal, the Company proposes to establish a system which would represent each employee's paycheck electronically, including transactions which effect direct deposit of payroll funds from the employer to the financial institution(s) selected by the employees. The electronic representation of the paycheck and/or the confirmation of electronic direct deposit of funds would be available via an Internet website managed by your client as a service to its clients (the employers). The web site would be secure using industry standard security and encryption technology. The paycheck image would include all data currently represented on either the check or confirmation of direct deposit, plus information currently represented on the either the check stub or the confirmation of direct deposit which is required by Labor Code Sections 226 and 1174, as well as Section 7 (B) of the Industrial Welfare Commission Wage Order applicable to the business operations of the employer in a particular employment situation. The information contained on the website would be available to the employees on or before the regularly scheduled pay date.

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Your letter further states the website would be accessible by employees either through the employees' personal home computers, via the Internet (software for such access being provided by the employer, presumably at no cost to the employee) for those employees who have home computers. Every employee, whether he or she has access to a home computer, would have access to a terminal, with printer connections at their worksite, and could obtain a printout of the information, without cost to the employee. Employee access would be controlled through the use of unique employee identification to access the website, and personal identification numbers (commonly referred to as "PIN" numbers) would be required to gain access to the specific employee account(s).

Your letter does not state where the information database will be located. Although Labor Code Section 1174 requires that such information be maintained at a central location within the State of California, former Acting Labor Commissioner Curry has previously opined that an employer may collect and maintain computerized payroll information at an out of state location, as long as a hard copy of the records was maintained at a central location within California. The current Labor Commissioner has endorsed this positive approach to harmonizing the requirements of statutes enacted before the advent, or at least common acceptance, of modern technological advances as they relate to employment practices which will improve efficiency without inhibiting or restricting the original purpose behind the statutes. As Commissioner Millan stated in his Opinion Letter of July 31, 1998:

Our enforcement history with respect to interpreting the provisions of Labor Code §224 requires us to read its requirements in conjunction with the requirements contained in companion statutes contained in Labor Code §§ 221-223. Obviously, all of these provisions deal with an employer's obligation to deal fairly and honestly with their employees in connection with the payment of their wages. Thus, while an employer is required to make lawful payroll deductions from employees' wages, those deductions may not amount to a kickback of wages owed to an employee (Labor Code § 221); or to withhold wages agreed upon through collective bargaining (Labor Code § 222); or to deduct from the wages owed to an employee or applicant for employment the cost of any pre-employment physical or medical examination taken as a condition of employment (Labor Code § 222.5); or to make a secret payment of a wage that is lower than the wage rate agreed upon by contract with the employee, or that is required by statute, e.g., minimum wage (Labor Code § 223).

As you can see, the requirements of Section 224 are designed to prevent a fraud from being perpetrated on an employee, by

preventing the employer from deducting any portion of the employee's wages not authorized by law or contract. The additional requirement that any deductions not obligated by statute or collective bargaining agreement be authorized in writing by the employee appears to be intended to prevent an Employer from making an otherwise lawful deduction from wages without first obtaining the express, and verifiable, authorization of the employee.

Thus, the use of "PIN" numbers or other appropriately secure procedures appears to meet the intent of Section 224, and DLSE has interpreted such practices as consistent with the requirements of Section 224, provided that the employee is subsequently provided with a hard copy confirming the employee authorization of the deduction. Your request would appear to presuppose that it was up to the employee, not the employer, to ensure that a hard copy was provided. Since the intent of the statute is to require the employer to provide the confirmation, it would not appear that your proposal meets the requirements of Section 224. I spoke with the Labor Commissioner about this issue, and he confirmed his earlier position that it is the employer's responsibility to provide a hard copy. To the extent that former Chief Counsel Cadell's letter of July 26, 1995 does not require that the employer furnish a hard copy of the pay stub information, that letter is disapproved by the Labor Commissioner, and cannot be relied upon.

I must take issue with the conclusion on page three of your letter that if your proposal met the requirements of Labor Code §§ 1174 and 226, that employers are entitled to "mandate conversion and eliminate the paper version entirely." If you are suggesting that employers have the right to mandate both direct deposit and electronic confirmation of that deposit for all employees, I must respectfully disagree. First of all, there appears to be no nexus whatsoever between the two concepts. As stated above, an employee who elects direct deposit is still entitled to an hard copy confirming said deposit. More importantly, however, your statement implies that employers have the right to require their employees to utilize the services of banks or other financial institutions which allow either direct deposit or other electronic transfer of funds. Not all financial institutions offer such services. Some employees may choose not to have accounts at any bank or other financial institution. Labor Code § 450 provides:

No employer, or agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of any thing of value.

While your suggestion that an employer can mandate use of electronic funds transfer does not require the employee to patronize a particular bank, the coercive effect is nonetheless what is prohibited.

It is not the intent of DLSE to place roadblocks to the efficient operation of the business community. However, this agency is limited to interpretation and enforcement of existing law, and is not free to legislate changes it may feel warranted or commendable. The Labor Commissioner has recently forwarded correspondence regarding this issue to our department's legislative unit for possible future legislation in this area to update the Labor Code in order to take into account the advances of technology, and to eliminate the possibility of any future misinterpretation of the statute.

Thank you for your interest in California labor law.

Yours truly,



Michael S. Villeneuve
Staff Counsel

cc: Jose Millan, Labor Commissioner
Miles Locker, Chief Counsel
Tom Grogan
Nance Steffen
Greg Rupp