

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 34 MDM 2015

ALISHA SICILIANO, CASSIE STARETZ,
SAMANTHA LYNN EARLY and JUSTIN ECK,
Individually and on behalf of all Similarly Situated Persons,
Plaintiffs/Appellees,

v.

ALBERT/CAROL MUELLER T-A McDONALD'S,
ALBERT AND CAROL MUELLER LIMITED PARTNERSHIPS,
ALBERT MUELLER, Individually,
and CAROL MUELLER, Individually,
Defendants/Appellants.

On Appeal from the May 29, 2015 Order
of the Court of Common Pleas of Luzerne County, No. 2013-07010

**BRIEF OF *AMICUS CURIAE* AMERICAN
PAYROLL ASSOCIATION**

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa. Cons. Stat. §702(b) and Pa. R.A.P. No. 312.

ORDER IN QUESTION

On May 29th, 2015, the Court of common Pleas of Luzerne County (Burke) entered the following Order in Case No. 2013-07010:

AND NOW, this 29th day of May, 2015, upon consideration of Defendants' Motion for Summary Judgment, Plaintiffs' Response thereto, Briefs submitted by the parties, and oral argument before this Court, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. For the reasons set forth in the attached OPINION, the Motion is DENIED.

2. Pursuant to 42 Pa. C.S.A. §702(b), the Court is "of the opinion that . . . [this] . . . Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from . . . [this] . . . Order may materially advance the ultimate termination of . . . [this] . . . matter."

3. The Clerk of Judicial Services and Records (Prothonotary) is directed to enter this Order and Opinion of record and to mail a copy of the Order and Opinion to all counsel of record pursuant to Pa. R.C.P. No. 236.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's scope of review of a trial court's order granting or denying summary judgment is plenary. Yorty v. PJM Interconnection, L.L.C., 79 A.3d 655, 662 (Pa. Super. Ct. 2013). The standard of review is that the trial court's order will be reversed only where it is established the lower court committed an error of law or abused its discretion. Id.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Payroll Association (“APA”) is the country’s leading private sector advocate for payroll issues. The APA is a nonprofit association representing more than 20,000 individual payroll professionals. These payroll professionals perform payroll processing services for more than 17,000 employers and for the major payroll service providers in the United States; these providers process the payrolls for an additional 1.5 million employers.

The APA’s primary mission is to educate its members and the payroll industry on how best to pay America’s workers while ensuring compliance with federal, state, and local laws. The APA, through its Government Relations Task Force, has spent the past decade monitoring the increasing use of payroll cards in the workplace. Working with its members on a nationwide level, the APA has advocated for sensible regulation of payroll cards to ensure that employers are able to offer this beneficial payment method to their employees, and that employees can use payroll cards to their best advantage.

The APA has a substantial interest in the outcome of this case; the APA has 950 members in Pennsylvania, and many of the APA’s non-Pennsylvania members process payrolls for employees who work in Pennsylvania. The APA has paid close attention to the development of Pennsylvania’s policy toward payroll cards. For instance, in September 2009, the APA sent a detailed request for an opinion to

the Pennsylvania Department of Banking, the Pennsylvania Department of Labor and Industry (“DLI”), and the Office of the Attorney General, urging these agencies to provide appropriate guidance to employers on the use of payroll cards. (A copy of the APA’s letter is attached hereto as Exhibit 1). The Office of Chief Counsel for DLI responded, expressing its position that payroll cards are permissible under Pennsylvania law provided specified conditions are met. (A copy of the DLI’s response is attached hereto as Exhibit 2). The APA has continued to closely monitor Pennsylvania’s payroll law since then, and has advised its members of subsequent developments including developments in this lawsuit.

The APA therefore has an interest in the outcome of this case because many of its members utilize payroll cards to provide their employees with a reliable and beneficial payment system; as of 2015, 24.2% of APA members offer payroll cards to their employees, an increase of more than one-third since 2013. As the APA regularly advises its members on payroll card compliance and plays a significant role in shaping payroll policy both nationally and in the Commonwealth of Pennsylvania, the APA is directly affected by this case.

STATEMENT OF THE QUESTIONS INVOLVED

Are wages paid via payroll cards considered to be paid in “lawful money of the United States or check” under Pennsylvania’s Wage Payment and Collection Law, 42 Pa. C.S.A. §260.3?

STATEMENT OF THE FACTS

Pennsylvania’s Wage Payment and Collection Law (“WPCL”) provides various lawful ways for Pennsylvania employers to pay their employees. 43 Pa. Cons. Stat. Ann. §260.2a. Specifically, the WPCL provides that employers must pay employees their wages “in lawful money of the United States or check.” Id. §260.3. In addition, the Pennsylvania Banking Code authorizes employers to deposit wages in an account at a financial institution designated by the employee upon the employee’s written request. 7 P.S. §6121.

On July 10, 2014, five current or former hourly employees of McDonald’s franchises in Luzerne and Lackawanna Counties, Pennsylvania, (the “appellees”) filed for class certification against the owners of those franchises. Pl.’s Mot. for Class Cert. at 1. The appellees brought their action under the WPCL, arguing that they had not been properly paid their wages. Appellees specifically claim that the exclusive use of payroll cards to pay their wages was a *per se* violation of the WPCL.

Payroll cards are prepaid, reloadable cards that are issued through a national or regional bank and are distributed to employees through their employer for the primary purpose of receiving wages. On payday, employers can electronically deposit an employee's full net wages into the employee's payroll card account (tied to the employee's payroll card), which can subsequently be withdrawn by the employee at an ATM or bank teller. The employee can also use the payroll card to make purchases and pay bills.

On September 4, 2014, the franchise owners (the "appellants") filed a motion for summary judgment arguing that they were in compliance with the WPCL because wages paid via payroll cards are lawful money of the United States or checks. The Court of Common Pleas denied the appellants' motion on May 29, 2015. See Def.'s Pet. for Permission to Appeal, Exhibit 4. The court, however, determined that the Order involved a "controlling question of law as to which there is substantial ground for difference of opinion," and certified the issue for an interlocutory appeal under 42 Pa. Cons. Stat. Ann. §702(b). Id., Exhibit 5. The appellants filed a petition for permission to appeal on June 23, 2015, which was subsequently granted by this Court. Id.

SUMMARY OF THE ARGUMENT

Virtually every state recognizes payroll cards to be a permissible method of wage payment either through legislation or administrative guidance. The states

vary significantly in their treatment of payroll cards, however, with some treating payroll cards as the functional equivalent of a paycheck, and others treating them as a form of direct deposit. Some states consider payroll cards to be both.

The sole issue before the Court is whether, under Pennsylvania law, payroll cards as utilized by the appellants constitute the payment of wages by lawful money of the United States or check.¹ The Court of Common Pleas held that they do not. It also suggested that Pennsylvania law requires that all wages be paid only in lawful money of the United States or by check. The broad implication of the trial court's analysis is that payroll cards are *per se* unlawful in Pennsylvania even when offered on a voluntary basis. Such an analysis, if adopted by the Court, would have a widespread and detrimental impact on thousands of APA members and the broader employer community, as well as tens (if not hundreds) of thousands of Pennsylvania workers who receive their wages on a payroll card.

First, this Court should find that payroll cards are a lawful form of wage payment under section 260.3 of the WPCL. Payroll cards function like a plastic paycheck for employees, who can withdraw their net wages on or after payday at a financial institution. In fact, the DLI and several other states recognize that payroll cards are the functional equivalent of a paycheck. Second, even if this Court were

¹ Under the facts of the case, it was appropriate for the lower court to focus its analysis on whether payroll cards constitute money of the United States or a check. For a period of time, appellants used payroll cards as the exclusive method of paying their workers. Under Pennsylvania law, cash and checks are the only methods of wage payment that may be required without the employee's voluntary consent.

to uphold the Court of Common Pleas' decision, the APA urges the Court to make clear that its holding does not render payroll cards *per se* unlawful in the state. Section 6121 of the Pennsylvania Banking Code expressly permits the deposit of wages to an account at a financial institution upon request of the employee. By definition, payroll cards involve the deposit of wages in an account at a financial institution. Thus, employers should still be able to offer payroll cards to employees on a voluntary basis.

Finally, good public policy also supports a finding that employers should be able to pay their employees using payroll cards. Payroll cards bring the benefits of electronic wage payment to employees who are unable to participate in traditional direct deposit because they do not have or want a checking or savings account. Employees using payroll cards receive increased security and convenience, and can promptly access their full wages regardless of employee location, or whether they are faced with unexpected contingencies such as severe weather conditions. Without payroll cards, many of these employees are forced to spend hundreds of dollars a year simply to access their wages at check cashing services. Payroll cards provide these employees with a means of accessing their wages without cost and a pathway into the financial mainstream – a benefit that this Court should ensure they continue to receive.

ARGUMENT

This Court should avoid any implication that payroll cards are per se unlawful under Pennsylvania law. First, payroll cards operate as the functional equivalent of checks and are therefore a lawful form of wage payment under the WPCL. Second, even if payroll cards are not the equivalent of checks, Pennsylvania law expressly permits the payment of wages by deposit to an account at a financial institution upon request of the employee. Finally, good public policy supports a finding that payroll cards are a lawful form of wage payment, as payroll cards provide significant benefits to unbanked and underbanked workers.

I. As Many States Have Recognized, Payroll Cards Are the Functional Equivalent of Paychecks, and Are Therefore a Lawful Form of Wage Payment.

Appellants contend that wages paid via a payroll card constitute payments by check for purposes of the WPCL. To support their claim, appellants point to a 2012 opinion letter issued by the DLI. See Def.'s Pet. for Permission to Appeal, Exhibit 3. In that letter, DLI recognized that payroll cards could be considered the functional equivalent of a paper paycheck when employees are able to accomplish everything with the cards that they could with paychecks. Id.

DLI is in good company with several other states that consider payroll cards to be the functional equivalent of a paycheck. For example, the Delaware

Department of Labor has promulgated regulations providing that an employer may comply with the statutory requirement that wages be paid by lawful money or cash by issuing a payroll card that is the functional equivalent of cash or a check. 19 Del. Admin. Code §1324-2.0. According to the regulations, a debit card is the functional equivalent of cash or a check when the employee is able to access “the full amount of wages without cost ... on the regular payday.” Id. §1324-1.7.

Besides Delaware, several other states have found payroll cards to be the equivalent of paychecks. In 2009, the Florida legislature added payroll cards to the statute addressing the payment of wages by check and other acknowledgements of indebtedness, not the statute governing direct deposit. Fla. Stat. §§532.01, 532.04. Like paychecks, payroll cards must be “negotiable and payable in cash, on demand, without discount ...” Id. §532.01. Similarly, Colorado and Maine both permit employers to pay wages using a payroll card so long as employees are provided a means of access to their entire net pay at least once each pay period; if not, employees must be able to choose another method of payment. Colo. Rev. Stat. §8-4-102(2.5); Me. Rev. Stat. 26, §663.1. The North Carolina Department of Labor has adopted a similar enforcement position in the absence of express statutory recognition of payroll cards.² In these states, so long as employees are able to cash out their wages each pay period like they would a paper paycheck,

² *Fact Sheet on Debit/Payroll Card Payments*, North Carolina Department of Labor, http://www.nclabor.com/wh/fact%20sheets/debit_payroll.htm.

employers may comply with state law by paying their employees using payroll cards only. Employers would still be required to comply with federal requirements, however.³

This Court should follow the lead of the aforementioned states that have already found payroll cards to be the functional equivalent of paychecks, and hold that an employers' use of payroll cards are a valid method of payment under the WPCL.

II. Pennsylvania Law Expressly Permits the Payment of Wages Using Methods of Payment Other than Lawful Money of the United States or Checks

Even if the Court were to find that payroll cards are not the functional equivalent of paychecks and, therefore, uphold the trial court's decision that would not render payroll cards per se unlawful. Pennsylvania law still authorizes the use of payroll cards as a form of direct deposit. Specifically, section 6121 of the Banking Code expressly authorizes employers to deposit an employee's wages into an account at a financial institution upon request of the employee. Section 6121 provides:

For purposes of any statute ... requiring any payment to be made in lawful money or by check, whether for wages, salaries, commissions or other claim of any kind, such payment may be made by credit to an

³ Note that federal law prohibits employers from mandating that employees receive their wages only on a payroll card of the employee's choosing. See Regulation E, 12 C.F.R. 1005.10(e)(2) and comment 10(e)(2)-1. Plaintiffs' Amended Complaint alleges violations of Pennsylvania law only and states expressly that "no claims arising from Federal Law" are asserted." See Pl.'s Am. Compl. ¶¶19, 20.

account in a bank, credit union or other financial institution authorized to accept deposits or payments designated by the recipient of such payment if the recipient has requested such method of payment in writing.

7 P.S. §6121.

By definition, payroll cards involve the deposit of wages into an employee's account at a financial institution. Indeed, in January 2006, the Board of Governors of the Federal Reserve System ("Board") issued an Interim Rule extending the provisions of a Regulation E to payroll cards and, in so doing, unambiguously recognized payroll card accounts to be the account of the employee.⁴ In its Final Rule, the Board stated:

By express definition, the coverage of [electronic funds transfer] services under the [Electronic Fund Transfer Act] and Regulation E depends upon whether a transaction involves an EFT to or from a consumer's account. Section 903(2) of the EFTA defines an "account" as a "demand deposit, savings deposit, or other asset account . . . as described in regulations of the Board, established primarily for personal, family, or household purposes." As explained in the interim rule, in light of the characteristics of payroll cards, the Board believes it is appropriate to exercise its authority . . . to classify payroll card accounts as "accounts" for purposes of Regulation E. Payroll card accounts are assigned to an identifiable consumer and represent a recurring stream of payments that is likely the primary source of the consumer's income. They are replenished on a recurring basis and

⁴ Electronic Fund Transfers, 71 Fed. Reg. 1,473 (proposed Jan. 10, 2006). Regulation E implements the Electronic Fund Transfer Act, which establishes the rights, liabilities, and responsibilities of participants in electronic funds transfer systems. In July 2011, enforcement authority over Regulation E was transferred from the Board to the Consumer Financial Protection Bureau.

designed for ongoing use at multiple locations and for multiple purposes.⁵

Thus, the payment of wages using a payroll card account, if not considered payment by cash or check, is clearly the payment of wages to an account at a financial institution authorized by section 6121 of the Banking Code. See 7 Pa. Cons. Stat. Ann. §6121. Indeed, regulators across the country have recognized payroll cards to be a permissible form of direct deposit even when payroll cards are not expressly mentioned in their wage payment statutes.⁶ As such, even if the Court were to find that payroll cards do not constitute payment in lawful money of the United States or check, its holding should be narrowly framed to avoid any implication that payroll cards are per se unlawful.

III. Payroll Cards Offer a Valuable Solution for Unbanked and Underbanked Workers, and This Court Should Ensure That They Remain an Available Form of Wage Payment.

Good public policy supports recognition of payroll cards as a valid form of wage payment under Pennsylvania law. More than 1.4 million households in Pennsylvania, or 27.4% of all households in the Commonwealth, are either unbanked (having no checking or savings account) or underbanked (having a

⁵ Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,440 (Aug. 30, 2006) (codified at 12 C.F.R. Pt. 1005).

⁶ See, e.g., Opinion Letter, Cal. Dep't of Ind. Relations Div. of Labor Standards Enforcement, <http://www.dir.ca.gov/dlse/opinions/2008-07-07.pdf>; *Electronic Wage Payment FAQs*, Montana Department of Labor and Industry, <http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/electronic-wage-payment-faq> (last visited Nov. 6, 2015); Nev. Admin. Code 608.135(2); N.J. Admin. Code 12:55-2.4(i).

checking or savings account, but still reliant on alternative financial services such as check cashing).⁷ These workers often receive their wages in cash or by check, both of which can be terribly inconvenient and inefficient. Cash can be lost or stolen, leaving the employee with no recourse or funds until the next pay period. For unbanked and many underbanked workers, checks often require a costly and time consuming visit to a check cashing establishment. There is no requirement in Pennsylvania that employees be able to cash their paychecks without cost, and check cashers in Pennsylvania are allowed to charge an employee a fee equal to 3% of the face amount of the employee's paycheck. 63 P.S. §2323. This means that a minimum wage earner in Pennsylvania working 40 hours a week could pay close to \$400 a year in check cashing fees, not to mention the additional cost of purchasing money orders to pay their bills.

Payroll cards offer these workers a valuable solution by providing a means of accessing their full net wages each pay period without cost. Today, most payroll cards are “branded,” meaning that they bear the logo of a major payment brand such as Visa or MasterCard. Employees are usually able to take their payroll card to any financial institution branch location that is a member of the payment brand – tens of thousands of locations nationwide – and obtain their full net wages from a bank teller without cost. Alternatively, employees can store some funds in

⁷ FDIC, National Survey of Unbanked and Underbanked Households, Appendix G-1 (2013), <https://www.fdic.gov/householdsurvey/2013appendix.pdf>.

the payroll card account for safekeeping, and use the card to make point-of-sale purchases, receive cash back from point-of-sale transactions, make purchases by mail, phone or Internet, and pay their bills. Many of these are things the employee cannot do when living in a cash economy.

The benefits of payroll cards are undeniable. The Center for Financial Services Innovation has stated that “payroll cards can serve as an important tool for building long-term financial health,” particularly for employees working low-paying or hourly jobs.⁸ Linda Sherry, Director of National Priorities for Consumer Action, notes that: “Payroll cards offer the opportunity for workers who would otherwise receive a paper paycheck to avoid potential check cashing fees, money orders and the risk of losing cash.” Javier Palomarez, President and CEO of the United States Hispanic Chamber of Commerce, observes that:

Payroll cards offer those with no banking access a dependable option for protecting their finances. Empowering our citizens with this much needed access, security, and convenience of prepaid payroll cards allows the unbanked to save more of what they earn and helps them build a solid financial foundation.⁹

Research supports these endorsements. In a study conducted by the San Francisco Office of Financial Empowerment and the Corporation for Enterprise Development, participants stated that payroll cards helped them prioritize their

⁸ Thea Garon & Beth Brockland, Center for Financial Services Innovation, *The Compass Guide to Payroll Cards* (2015).

⁹ See, Javier Palomarez, [Payroll Cards: A Valuable Option for Those in Financial Need](http://www.huffingtonpost.com/javier-palomarez/payroll-cards-a-valuable-_b_4555801.html), Huffington Post, Jan. 8, 2014, http://www.huffingtonpost.com/javier-palomarez/payroll-cards-a-valuable-_b_4555801.html.

spending, enabled them to shop online, and helped them to save money.¹⁰ A study conducted by the Federal Reserve Bank of Philadelphia concluded that payroll cards are the most cost-effective transaction accounts available for consumers without bank accounts; less costly than checking accounts and general purpose prepaid debit cards, and less than one-fifth the cost of check-cashing services.¹¹ A study by the Payment Card Center of the Federal Reserve Bank of Philadelphia confirmed that many employees use payroll cards without ever incurring a fee, and those who do incur fees could have avoided them.¹² In light of these benefits, it is not surprising that virtually every state recognizes payroll cards to be a lawful method of wage payment.¹³

¹⁰ E. Fitzgerald & L. Phillips, Financial Empowerment through Employer Engagement: Migrating a City to a Paperless Payday (2011), http://sfofe.org/wp-content/uploads/2011/09/White_Paper_Fin_Empowerment_thru_Employer_Engagement_2011_03_final.pdf.

¹¹ James C. McGrath, Fed. Reserve Bank of Philadelphia, The Cost Effectiveness of Stored-Value Products for Unbanked Consumers (2005), <https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2005/D2005MarchUnbankedCover.pdf>.

¹² S. Wilshusen, R. Hunt, J. van Opstal, & R. Scheider, Fed. Reserve Bank of Philadelphia, Consumer's Use of Prepaid Cards: A Transaction-Based Analysis (2012), <https://www.philadelphiafed.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2012/D-2012-August-Prepaid.pdf>.

¹³ Twenty-five states have updated their wage payment statutes or regulations to expressly address payroll cards. These states are Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma (attorney general opinion), Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, and West Virginia. In most of the remaining states, the wage and hour regulators have adopted enforcement positions recognizing payroll cards to be a permissible method of wage payment. In fact, the APA is aware of only one state where the use of payroll cards is in question. The Connecticut Department of Labor takes the position that payroll cards are not an authorized method of payment due largely to the fact that legislation

As payroll cards provide significant benefits to countless employers and employees in Pennsylvania, this Court should ensure that payroll cards continue to be available as a form of wage payment.

CONCLUSION

For the foregoing reasons, the APA respectfully requests that the Court find that payroll cards are a valid form of wage payment under Pennsylvania law. Even if the Court were to find that payroll cards do not constitute lawful money of the United States or checks and, therefore, upholds the trial court's decision, it should avoid any implication that payroll cards are per se unlawful in Pennsylvania.

Respectfully Submitted,

AMERICAN PAYROLL ASSOCIATION

A handwritten signature in cursive script, reading "Alice P. Jacobsohn", written in dark ink. The signature is fluid and elegant, with a long, sweeping underline that extends to the right.

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governing the use of the cards did not pass. However, new legislation is expected to be introduced in the coming legislative session.

CERTIFICATION OF COMPLIANCE WITH PENNSYLVANIA'S
RULES OF APPELLATE PROCEDURE

I, Alice P. Jacobsohn, Esquire, do certify that in accordance with Pa. R.A.P. 2135 this brief of *AMICUS CURIAE*, American Payroll Association, does not exceed 14,000 words. In accordance with Pa. R.A.P. 2187, one original and six book bound copies of this *amicus* brief were provided to the Superior Court of Pennsylvania, sent by overnight mail on November 11, 2015 to:

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CERTIFICATION OF SERVICE

I, Alice P. Jacobsohn, Esquire, do certify that in accordance with Pa. R.A.P. 2187 and Pa. R.A.P. 121, a true and correct copy of the brief of *AMICUS CURIAE*, the American Payroll Association, was served by email filing and first class mail upon the following parties of record on November 11, 2015:

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Exhibit 1



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Government Relations • Washington, DC

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Dear Mr. Frantz, Mr. Holzman and Mr. Mulle,

By way of this letter, the American Payroll Association (APA) requests that the Commonwealth of Pennsylvania clarify its position on paperless wage payment programs (i.e., programs that give employees the choice between receiving their wages by direct deposit or on a payroll card). Many of our members have expressed an interest in implementing electronic wage payment programs given the many benefits that they offer. As discussed below, these benefits include: (1) a substantial cost savings, (2) immediate access to wages no matter where the employee is located, (3) convenience, (4) increased security, (5) access to wages even when faced with inclement weather and natural disasters, (6) ease of compliance with strict final wage payment requirements and (7) a positive environmental impact.

The APA previously contacted both the Department of Labor and Industries and the Department of Banking and appreciates the guidance provided by these agencies. As discussed below, however, some questions remain unresolved and it is unclear whether there is an agency responsible for interpreting and enforcing the statutory provisions regarding electronic wage payment. For this reason, we have addressed this request to both agencies, as well as the Attorney General's Office, in the hope that this issue can be resolved and appropriate guidance provided to employers.

The APA specifically requests that the Attorney General's Office or the appropriate agency issue an opinion letter or adopt regulations addressing the circumstances under which employers may implement purely electronic wage payment programs. The relevant issues, as

well as sample regulatory language, are set forth below. In addition, we discuss three approaches to paperless pay utilized by states with wage payment statutes similar to Pennsylvania's statutory framework.

I. INTRODUCTION

A. The American Payroll Association

The APA is a nonprofit professional association representing more than 24,000 payroll professionals and their companies in the United States and Canada. 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. In addition, the APA's Government Affairs Task Force 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 by employer's in the use of payroll cards as part of their wage payment program. 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 interested in payroll card programs.

B. A Description of Payroll Cards

A payroll card is a pre-paid, reloadable ("stored value") card issued through a national or regional bank. On payday, the card is electronically loaded with the full amount of the employee's net pay. The employee can then use the payroll card to access his or her wages. Payroll cards normally are offered as an alternative to other methods of wage payment such as direct deposit.¹

Virtually every payroll card program today allows employees to withdraw their entire net pay, or deposit the amount into their checking and/or savings account, at least once each pay period at no cost. Depending on the program, employees usually are able to access their pay in a variety of other ways, such as ATM withdrawals, bank teller transactions and point of sale transactions. Employees who are paid using a branded payroll card (i.e., one bearing the Visa, MasterCard or Discover logo) are able to walk into any bank that issues that particular brand of card and obtain their full wages from the bank teller without fees. This means that employees can access their full wages on payday with no fee at tens of thousands of locations nationwide.

¹ Indeed, a program mandating payroll cards alone would violate Federal Reserve Regulation E which prohibits an employer from requiring its employees to receive wages by electronic fund transfer to a particular financial institution. Nevertheless, the Federal Reserve Board takes the position that employer may comply with regulation E by giving employees the choice between payment by direct deposit or on a payroll card. 71 Fed. Reg. 1473, 1479 (January 10, 2006).

II. CURRENT LEGAL FRAMEWORK AND SUGGESTED ADMINISTRATIVE APPROACHES

A. Applicable Pennsylvania Legal Authorities

As you know, Pennsylvania's Wage Payment and Collection Law requires that wages be paid "in lawful money of the United States or check, ..." 43 P.S. § 260.3. In turn, the Banking Code provides:

For purposes of any statute ... requiring any payment to be made in lawful money or by check, whether for wages, salaries, commissions or other claim of any kind, such payment may be made by credit to an account in a bank, credit union or other financial institution authorized to accept deposits or payments designated by the recipient of such payment if the recipient has requested such method of payment in writing.

7 P.S. § 6121. The Banking Code further requires that the written agreement set forth all terms and conditions under which the transfers are to be made and the methods by which the wage-earner may withdraw his or her request and terminate the agreement. 7 P.S. § 6122.

Neither the Wage Payment and Collection Law nor the Banking Code specifically addresses the use of payroll cards. In a letter addressed to the American Payroll Association dated July 2, 2008, the Pennsylvania Department of Labor and Industries, Bureau of Labor Law Compliance ("Bureau") suggested that for purposes of the Wage Payment and Collection Law, it would be prudent for employers to obtain employee authorization when using alternative forms of wage payment such as direct deposit and payroll cards. The Bureau also stated that payment using a debit card is covered by sections 6121 and 6122 of the Banking Code and that these provisions fall within the jurisdiction of the Pennsylvania Banking Department.

In September 2005, the Department of Banking issued an opinion letter addressing a payroll card program and concluded that the program under review did not violate any of the laws within the Department's jurisdiction. In a footnote, however, it stated that sections 6121 and 6122 of the Banking Code were outside of its jurisdiction. The Department confirmed that this is the case in a more recent conversation.

Thus, both the Department of Labor and Industries and the Department of Banking recognize payroll cards as a permissible method of wage payment under Pennsylvania law. It is not clear, however, whether employers in Pennsylvania may implement purely electronic wage payment programs without also offering employees the option of a paper paycheck. Nor is it clear who can answer these questions.

B. Suggested Administrative Approaches

The wage payment statutes and regulations in a number of states are similar to Pennsylvania's Wage Payment and Collection Law. Many of these states permit paperless wage payment. The following is a brief discussion of three approaches used by other states when addressing electronic wage payment.

1. Payroll Cards as the Functional Equivalent of Cash or Checks

One group of states takes the position that payroll cards are the functional equivalent of cash or checks and, therefore, may be used to compensate employees so long as the conditions for payment in cash or by check are satisfied. Delaware, for example, has adopted a regulation stating in pertinent part:

Delaware's Wage Payment and Collection Act requires the payment of wages to employees in lawful money or checks payable on demand, "provided suitable arrangements are made by the employer for cashing such checks for the full amount of the wages due at a bank or other business establishment convenient to the place of employment." Employers may comply with this requirement by issuing a payroll debit card which provides the functional equivalent of cash or a check. ...

Code of Del. Regs. § 65-400-013 (2.0). "Functional equivalent," in turn, is defined by the regulations to mean "a change in the form of the payment of wages without impacting the substantive rights or value of the employee's wages. For example, a debit card in lieu of cash, check, or credit must provide the full amount of wages without cost to the employee on the regular payday." Code of Del. Regs. § 65-400-013 (1.7).

Indiana has issued an informal letter to the same effect.² In these states, so long as employees are able to access their full wages on payday without cost, payroll cards may be used like a conventional paper paycheck. Thus, one possible approach for Pennsylvania would be for the Department of Labor and Industries to adopt regulations or issue an opinion letter recognizing payroll cards to be the functional equivalent of cash or a check.

2. Electronic Wage Payment as a Condition of Employment

A second approach would be to make clear that consent to electronic wage payment may be made a condition of hire or continued employment. This is the approach taken in Texas.³ This approach appears to be consistent with Pennsylvania's case law authority. In *Statler v. Unemployment Compensation Board of Review*, 728 A.2d 1029 (Pa. Cmwlth 1999), for example, the court held that an employee who was terminated for failing to complete a form authorizing direct deposit of his wages was not entitled to unemployment benefits because the refusal to sign the authorization form constituted willful misconduct. See 43 P.S. § 802(e) (An employee is ineligible for compensation where his unemployment is due to "discharge ... from work for willful misconduct connected with his work ...").⁴ According to the court, an employee

² The Tennessee Attorney General has even issued an opinion letter stating that payment by direct deposit is considered payment of money of the United States. Tenn. Atty Gen. Op. No. 86-94.

³ Under Texas law, an employee must agree in writing to methods of wage payment other than cash, check or electronic fund transfer. Tex. Labor Code § 61.016(b). The Texas Workforce Commission has advised that this provision applies to payroll cards but that an employer may make written authorization to payment using a payroll card a condition of hire or continued employment.

⁴ The employee's employment was subject to a collective bargaining agreement stating that as a condition of employment, all current employees were required to make the necessary arrangements to allow for electronic fund transfer. The employee refused to sign the authorization form, however, claiming that it gave the employer access to his personal banking account because it authorized the employer to make appropriate adjustments in the event of an overpayment. The employee refused to sign even after

waives his or her right to object to an employer's reasonable requests when he or she voluntarily assumes a legal relationship with the employer. *Id.*

Other Pennsylvania courts similarly have held that employers may require at-will employees to consent to a particular term as a condition of hire or continued employment. See, e.g., *Beach v. Burns International Security Services*, 593 A.2d 1285 (Pa. Super. 1991) (requiring at-will employees to sign a jury waiver form as a condition of employment did not violate public policy and, therefore, was permitted); *Kelchner v. Sycamore Manor Health Center*, 305 F.Supp.2d 429 (M.D. Pa. 2004), *affirmed* 135 Fed. Appx. 499 (3rd Cir. 2005) (employer may require that employee authorize procurement of a consumer report as a condition of continued employment so long as the employer complies with the Fair Credit Reporting Act when procuring the report); *ATM Corp. of America v. Unemployment Compensation Board of Review*, 892 A.2d 859 (Pa. Cmwlth 2006) (employee's refusal to authorize a background check constituted willful misconduct rendering the employee ineligible for unemployment compensation).

An employer may not, however, require employees to consent to a term of employment if doing so would violate a well established public policy.⁵ Arguably, requiring employees to consent to direct deposit alone could violate public policy because such a program would exclude a particular segment of the population (i.e., those unable to obtain bank accounts) from employment. Studies have shown that these “unbanked” employees tend to come from minority groups. When payroll cards are offered along with direct deposit, however, personal bank accounts are not required and, therefore, every employee is eligible to participate. There is no risk of disparate treatment and, therefore, no risk that the requirement would violate public policy. Accordingly, employers in Pennsylvania should be permitted to require written authorization for direct deposit or payroll cards as a condition of hire or continued employment.

3. Payroll Cards as a Default for Employees Who Fail to Authorize Direct Deposit

A third group of states permits purely electronic wage payment programs so long as an employee that fails to designate a financial institution and/or authorize direct deposit is offered an alternative method of wage payment. Purely electronic wage payment is permitted because an employee that fails to designate a financial institution may be offered a payroll card as the default option. Kansas and Virginia are two states that take this approach. The Kansas statute provides in pertinent part:

(b) The employer may designate the method by which employees receive wages, provided all wages shall be paid by one or more of the following methods:

- (1) In lawful money of the United States;
- (2) by check or draft which is negotiable in the community wherein the place of employment is located;

the employer offered to accommodate his concerns by instructing him to strike the offending language from the form.

⁵ For example, under Pennsylvania law, compelling an employee to consent to a polygraph examination under threat of job termination would contravene the well established public policy set forth in section 7321 of the Criminal Code. 18 P.S. § 7321; See, also, *Leibowitz v. H.A. Winston Company*, 493 A.2d 111 (Pa. Super. 1985). This section makes it a misdemeanor for an employer to require an applicant or employee to submit to a polygraph examination as a condition of employment or continued employment.

(3) by electronic fund transfer or deposit to an automated clearinghouse member financial institution account designated by the employee; or

(4) by payroll card.

(c) Any employer that elects to pay wages only by a method authorized in subsection (b)(3) shall offer an alternative payment method as a default option for employees that fail to designate a financial institution account for electronic fund transfer or deposit.

(d) Any employer that elects to pay wages using a payroll card as authorized in subsection (b)(4) shall allow employees at least one means of fund access withdrawal per pay period at no cost to the employee for an amount up to and including the total amount of the employee's net wages, as stated on the employee's earnings statement

Kansas Stat. § 44-314(b)-(d).

C. Sample Regulatory Language

Any one of the above approaches could easily be implemented under Pennsylvania's current statutory scheme, either through the formal rulemaking process or by issuing an opinion letter. As an example, we have drafted the following language that incorporates portions of each of the above approaches in the context of Pennsylvania law:

Nothing in section 260.3 of the Wage Payment and Collection Law or section 6121 and 6122 of the Banking Code prohibits an employer from using a payroll card to deliver wages to employees provided the following conditions are satisfied:

1. Employees are provided at least one means of accessing their entire net pay each pay period without fees, at an established place of business in the state;
2. Employees are provided with information regarding the terms and conditions of the payroll card program, including any fees that may be assessed;
3. Employees continue to receive a statement of wage and deductions each pay period in accordance with 34 Pa. Admin. Code § 231.36. The statement may be provided to employees electronically so long as each employee is provided with a convenient means of accessing the information without fees on payday; and
4. Whenever payroll cards are offered, employees also are given the option of having their wages directly deposited into their personal account at a financial institution of their choice in accordance with sections 6121 and 6122.

III. USE AND BENEFITS OF ELECTRONIC WAGE PAYMENT

A. Electronic Wage Payment Has Gained Widespread Acceptance

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. Regulation E provides a number of protections to consumers using electronic fund transfer systems. The FDIC also recognizes the increased acceptance and use of payroll cards, and recently issued an opinion stating that the funds underlying payroll cards are insurable deposits.⁶ 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,⁷ and **the law and/or administrative enforcement positions in at least 21 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 direct deposit and/or payroll cards and more than 35 states use prepaid cards (similar to payroll cards) to distribute government benefits such as unemployment insurance payments, aid to families and child support. Food stamps are delivered almost exclusively on prepaid cards and, last year, the Federal government began using prepaid cards to deliver social security benefits to recipients who do not have bank accounts.⁸

In Pennsylvania, unemployment benefits are now paid using debit cards and direct deposit only. Governor Rendell expects that the program will save the Commonwealth two million dollars annually, mostly in reduced mailing and check processing costs. Alan Butkovitz, Controller of the City of Pennsylvania, intends to bring paperless pay to city employees and has stated that "moving to paperless pay checks (direct deposit/debit cards) will increase productivity and eliminate unnecessary expenses."⁹ He estimates that printed paychecks and pay stubs for current city employees and pensioners results in the use of more than one million pieces of paper and costs city taxpayers up to \$500,000 in materials, labor and postage each year.¹⁰

⁶ FDIC General Counsel's Opinion No. 8, 73 Federal Register No. 220, at p. 67155 (Nov. 13, 2008), available at <http://edocket.access.gpo.gov/2008/pdf/E8-26867.pdf>.

⁷ These states are Colorado, Delaware, Florida Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Virginia and West Virginia. In addition, Utah has issued proposed regulations governing the use of payroll cards and currently is reviewing comments submitted in response to the proposal.

⁸ Financial Management Service, Press Release, *U.S. Treasuring to Launch Prepaid Cards for Unbanked Social Security, SSI Benefit Recipients* (January 4, 2008) available at http://www.fms.treas.gov/news/press/financial_agent.html.

⁹ Press Release, Office of the Controller, City of Pennsylvania (Sept. 17, 2008), located at <http://www.philadelphiacontroller.org/page.asp?id=334>

¹⁰ *Id.* Mr. Butkovitz also emphasized the environmental benefits of paperless payroll, stating:

Not surprisingly, the increased use of electronic wage payment methods corresponds with a decreased reliance on paper checks. The United States Government Accountability Office has observed that: "By 2003, led by rapid growth in debit card payments, the number of electronic payments exceeded the number of check payments for the first time in U.S. history."¹¹ The Federal Reserve estimates that roughly 30 billion checks were paid in the United States in 2006, down from approximately 37 billion in 2003, and 42 billion in 2001.¹² This is one reason why the Federal Reserve has reduced the number of locations where it processes paper checks from 45 in 2003 to 18 in 2008, with only four locations scheduled to remain by early 2010.¹³

B. Benefits of Electronic Wage Payment

The rapid acceptance of electronic payment methods is undoubtedly due to the many benefits that they offer to both employees and employers alike. From the employee's perspective, direct deposit and payroll cards eliminate check cashing fees and remove delivery problems that often result when, for example, an employee is ill or traveling. Electronic wage payment also facilitates the delivery of wages during inclement weather and natural disasters. Employees without bank accounts, who are likely to be the principal users of payroll cards, generally incur high fees when cashing their payroll checks and then incur additional costs when paying bills using money orders or traveling to a payment location to pay in cash.¹⁴ These fees are eliminated when employees are given the option of receiving their wages by direct deposit or on a payroll card. In fact, payroll cards have been found to be one of the least expensive ways for an employee to receive wages.¹⁵ Accordingly, it is not surprising that a study by the Comptroller

In addition, it will help advance the City's sustainability goals by eliminating almost 5 tons of paper per year and saving more than 130 trees. A transition to paperless pay would place Philadelphia in the vanguard of municipal governments in green operating policy and set an important precedent in the City and the region.

http://www.philadelphiacontroller.org/publications/fpau/paperless_pay_report_9-16-2008.pdf

¹¹ United States Government Accountability Office, *Electronic Payments: Many Programs Disburse Federal Benefits, and More Outreach Could Increase Use*, GAO-08-645 (June 2008).

¹² Federal Reserve Board Press Release, *Federal Reserve Banks Announce Reduced Number of Check Processing Sites and Accelerated Restructuring Schedule* (November 6, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20081106a.htm>.

¹³ Federal Reserve Board Press Release, *Federal Reserve Banks Announce Restructuring Schedule Changes As Electronic Check Process Continues to Accelerate* (March 31, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20080331a.htm>.

¹⁴ A survey recently conducted by the Brookings Institute reveals that approximately 10 million households in the country lack any type of transaction account (e.g., savings or checking) and approximately 12 million do not have a checking account. Metropolitan Policy Program at Brookings, *Banking on Wealth: America's New Retail Banking Infrastructure and Its Wealth-Building Potential*, January 2008, http://www.brookings.edu/~media/Files/rc/reports/2008/01_banking_fellowes/01_banking_fellowes.pdf.

¹⁵ Federal Reserve Bank of Philadelphia, *The Cost Effectiveness of Stored-Value Products for Unbanked Consumers* (May 2005).

of the Currency revealed that once employees use a payroll card they rarely revert back to receiving a paper paycheck.¹⁶

Electronic payment methods also reduce the risks associated with lost or stolen paychecks. If a payroll card is lost or stolen, federal liability limitations protection will shield employees from losses arising from fraudulent use. In addition, branded cards (i.e., those bearing a Visa, Mastercard or Discover logo) are covered by the brand's zero liability program.

For employers, the benefits of direct deposit and payroll cards are primarily financial and administrative. The cost of issuing and distributing paper paychecks can be enormous, particularly for large employers and employers with dispersed workforces who often rely on overnight carriers to deliver payroll. Even for smaller employers, electronic payment methods reduce check processing costs and eliminate expenses associated with lost or stolen paychecks. According to the Comptroller of the Currency, it costs businesses between \$8 and \$10 to replace a lost or stolen paycheck, and approximately four million paychecks are lost or stolen every year.¹⁷

Convenience to employees and prompt access to wages translates into increased morale and a more productive workplace as employees spend less time during the working day handling personal banking and finances. Payroll cards also are an attractive option for employers who are looking to become more environmentally conscious.

¹⁶ Comptroller of the Currency, *Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked*, (June 2005).

¹⁷ Comptroller of the Currency, *Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked* (June 2005), available at <http://www.occ.treas.gov/Cdd/payrollcards.pdf>.

IV. CONCLUSION

For the above reasons, the APA respectfully requests that the Commonwealth provide guidance to employers who wish to compensate their employees using electronic payment methods. Employers are particularly interested in whether they may give employees the option of receiving wages by direct deposit or on a payroll card without also offering a paper paycheck option.

We would welcome the opportunity to discuss these issues with you in more detail. In this regard, please feel free to contact Cathy Beyda at (408) 973-8215, Pete Isberg at (610) 827-1591, or Bill Dunn at (202) 232-6889.

Sincerely,

Cathy S. Beyda, Esq.
American Payroll Association
Chair, Paycard Subcommittee, Government Affairs Task Force



Pete Isberg
American Payroll Association
Paycard Legislative Subcommittee, Government Affairs Task Force



William Dunn, CPP
American Payroll Association
Manager of Government Relations

Exhibit 2



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

October 1, 2009

William Dunn
American Payroll Association
1601 18th St., NW, Suite 1
Washington D.C. 20009-2505

RE: Electronic Payment: Direct Deposit & Payroll Debit Cards

Dear Mr. Dunn:

This is in response to your request for an opinion from the Department of Labor and Industry regarding electronic payment programs.

Under Pennsylvania law, payment by direct deposit and debit card is permissible. However, an employee must agree to one of these forms of payment. It appears that an employee may not be compelled to accept payment through direct deposit or a debit card.

The Pennsylvania Banking Code allows payment of salary "by credit to an account in a bank, credit union or other financial institution authorized to accept deposits or payments designated by the recipient of such payment if the recipient has requested such method of payment in writing." 7 P.S. § 6121. However, the recipient must enter a written agreement authorizing this payment and may withdraw this authorization. 7 P.S. § 6122.

Section 3(a) of the Wage Payment & Collection Law (WPCL) allows deductions permitted or mandated by law (e.g., taxes), or authorized in the regulations of the WPCL. 43 P.S. § 260.3(a); 34 Pa. Code § 9.1. In general, wage deductions are only authorized if they are for the convenience of the employee(s). 34 Pa. Code § 9.1. Any deduction of fees associated with an employee's use of the payroll debit card must be for the benefit of the employees. The list of authorized deductions does allow for a non-specifically listed deduction that is authorized in writing by employees and is

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William Dunn

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proper and in conformity with the intent and purpose of the Pennsylvania Wage Payment and Collection Law. 34 Pa. Code § 9.1(13). In order to fall under section 9.1(13), the deduction of the fees would have to be authorized in writing by the employee in conformity with the intent and purpose of the WPCL. The deduction must be reasonable and cover only the costs associated with use of the card.

Section 4 of the WPCL requires an employer to notify employees at the time of hiring of the time and place of payment and the rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employee, a third party or a fund for the benefit of the employee and any change concerning any of these items before any change. The notification can be made by posting this information and keeping it posted conspicuously at the employer's place of business. 43 P.S. § 260.4.

Under the Pennsylvania Minimum Wage Act ("MWA"), employers are required to provide each employee with a statement with every payment of wages, which lists: hours worked, rates paid, gross wages, allowances claimed as part of the minimum wage (if any), deductions, and net wages. 34 Pa. Code § 231.36. If an employer desires to utilize electronic direct deposit statements, the employer must provide all employees access to a computer and the ability to print copies of their statements for their personal use. 34 Pa. Code § 231.36. Employer's must also keep proper records of the deductions and wages which is accessible to the Bureau of Labor Law Compliance which enforces this law. 43 P.S. § 260.8. These requirements are also contained in MWA. 43 P.S. §§ 333.107, 333.108; 34 Pa. Code § 231.31.

This opinion does not constitute an adjudication or binding norm. Further, the Bureau may revise this opinion and prosecute cases based upon any future judicial interpretations. In addition, there may be additional state or federal statutes, such as the Fair Labor Standards Act, or other legal issues that may apply to your question. Information about the WPCL & MWA is available on the Labor & industry website: www.dli.state.pa.us (Keywords: "Labor Law Compliance" then "Minimum Wage Act" or Wage Payment and Collection Law").

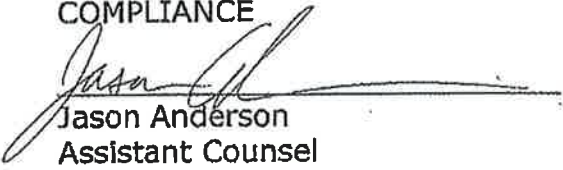
William Dunn

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FOR THE BUREAU OF LABOR LAW
COMPLIANCE



Jason Anderson
Assistant Counsel

cc: A. Robert Risaliti, Director, Bureau of Labor Law Compliance