American Payroll Association

Government Relations • Washington, DC

House Committee on Commerce and Consumer Protection
March 25, 2014, 10:30 a.m.
State Capitol, Conference Room 229

Written Testimony for House Bill 1814, SD1

TO: Senator Rosalyn H. Baker, Chair
Senator Brian T. Tanguchi, Vice Chair
Members of Committee

The American Payroll Association (APA)[1] appreciates the opportunity to submit the following written testimony with respect to House Bill 1814, Senate Draft 1 (HB 1814, SD1). If enacted, HB 1814, SD1 would amend Hawaii's wage payment statutes to expressly authorize direct deposit and payroll cards in the state so long as they are offered to employees on a voluntary basis and a number of consumer protections are in place. As discussed in our previous written testimony on HB 1814, we believe that electronic wage payment methods are more secure, more reliable and more convenient than paper paychecks.

We are concerned with several of the amendments made by the Senate Judiciary and Labor Committee through SD1, some of which are ambiguous and fail to put employers on clear notice of what is required of them under Hawaii's wage payment statutes. Our specific concerns are discussed more fully below.

At the outset, however, the APA wishes to voice deep concern over the Department of Labor and Industrial Relation's (DLIR's) recent decision to suspend its April 13, 2006, Declaratory Order authorizing the use of payroll cards. For eight years our members have relied on it, in good faith. Despite our understanding that the DLIR has received few if any complaints regarding the use of payroll cards during this period, it has decided to make its Suspension Notice effective May 1, 2014, before HB 1814 could possibly become effective. This decision puts numerous employers in the untenable position of having to stop paying workers using payroll cards for an indeterminate period of time, to their own detriment and the detriment of employees who have voluntarily elected this beneficial payment method, or risk being found in violation of the state's wage and hour laws. They will then need to re-implement their payroll card program when HB

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1814 becomes effective. This is an extreme and onerous burden on employers, including many in the hospitality industry, which is the backbone of Hawaii's tourist industry. Unfortunately, this adds credibility to the claim that Hawaii is one of the least business-friendly states in the nation.

By May 1, 2014, we will know whether HB 1814 has passed both houses, though there is no guarantee that the Governor will have signed the bill into law or allowed the bill to become law without his signature thereby permitting the continued use of payroll cards in the state. The DLIR's 2006 Declaratory Order should remain in effect until HB 1814 takes effect. In the unlikely, and unfortunate, event that HB 1814 is not enacted in a way that permits the continued use of payroll cards, employers should be given a reasonable period of time to transition payroll processes for effected employees. We urge the DLIR to amend the Suspension Notice accordingly. In addition, we recommend that a provision be added to HB 1814, SD1, with an immediate effective date, expressly providing that the DLIR's April 13, 2006, Declaratory Order shall remain in effect until the effective date of the remaining provisions of the Act.

Amendments that fail to put employers on clear notice of their obligations under state law

The APA recommends that the following provisions be revised, as they fail to provide employer with clear notice of their obligations under Hawaii's wage and hour laws.

1. ***Full and free access to wages (proposed § 388-2(e)(4))***

Consistent with the DLIR's Declaratory Order, House Draft 2 (HD2) required that employees be provided "the ability to withdraw the employee's full net wages at least once per payroll period without incurring any costs or fees." The APA has supported this approach, which is consistent with statutes and regulations that address payroll cards in all states except Vermont. The Vermont statute requires three free withdrawals each pay period, one of which provides access to the full amount. In contrast, the DLIR suggested the Senate Judicial and Labor Committee adopt the Vermont language.

Notwithstanding the testimony of the APA, the DLIR and other stakeholders, the Committee adopted the following language: "The employee shall have the ability to withdraw the employee's full net wages at least three times per payroll period without incurring any costs fees." An employee can only withdraw his or her full net wages once each pay period, however. Thus, the requirements of SD1 are unclear and employers will have no idea what they need to do to comply with the law.

2. ***Exclusive ownership of funds in a payroll card account (proposed § 388-2(e)(12))***

SD1 added the following language to HB 1814:

> The employee's pay card account shall be separate from all other employees, for the sole and exclusive benefit of the named employee, and not subject to the claims of the employer's creditors.

The APA has no objection to the concepts underlying this provision, but is concerned that it may give rise to confusion. This is because most payroll card accounts are structured as pooled or omnibus accounts with individual subaccounts owned by each employee. SD 1 should be revised to make clear that these subaccounts satisfy the requirements of proposed section 388(e)(12). Indeed, the federal banking regulators recognize payroll card accounts to be the personal account of each employee whether structured as individual accounts or pooled accounts with individual subaccounts for each employee. Thus, when the Federal Reserve Board extended Regulation E to payroll cards, it stated:

> By express definition, the coverage of [electronic funds transfer] services under the [Electronic Funds 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 designed for ongoing use at multiple locations and for multiple purposes.[1]

If there is still concern about ownership of a payroll card account and access to the funds in the account, a simple solution would be to require that the accounts be eligible for federal deposit insurance on a pass-through basis to the employee. Pass-through insurance means that in the event of bank insolvency, the individual employee's subaccount, rather than the omnibus account, is protected to the full extent permitted by law. The requirements for pass-through insurance include requiring that the funds actually be owned by the employee-cardholders and that in the subaccount be clearly identifiable as belonging to the employee.[2]

3. Required payment options (proposed § 388-2(e)(1)(b))

While the APA supports state law initiatives that allow employers to offer their employees the choice between direct deposit and payroll cards without also offer a paper paycheck, we do not believe this is the intent of HB 1814. In fact, HB 1814 requires an employee's voluntary

[1] 71 Federal Register 51437, 51440 (August 30, 2006).

[2] Specifically, the requirements for pas through insurance are: (1) the account records of the depository institution must disclose the existence of the agency or custodial relationship (e.g., titling the account as "ABC Company as Custodian for Cardholders"); (2) the records of the insured depository institution, custodian or other party must disclose the identities of the cardholders who actually own the deposits and the amount owned by each cardholder; and (3) the funds in the account must actually be owned by the individual cardholders under an agreement among the parties or pursuant to applicable law. *See,* Federal Deposit Insurance Corporation, General Counsel Opinion No. 8, 73 Fed. Reg. 67155 (Nov. 13, 2008).

authorization for both direct deposit and payroll cards. Yet, proposed section 388-2(e)(1)(b) requires employers who offer payroll cards to also offer deposit ***or*** a paper paycheck. To the extent that the intent of the bill is to require both options, "or" should be replaced with "and" to avoid confusion.

4. ***Obligation to provide a replacement card once a year and prior to card expiration (proposed § 388-2(e)(14))***

Proposed section 388-2(e)(14) requires employers to provide "one free replacement card per year at no cost to the employee before the pay card's expiration date." Most pay cards remain active for more than one year. To avoid confusion, we recommend that this provision be revised to require one free replacement card: (1) each year upon request by the employee, and (2) prior to the card's expiration date.

5. ***Voluntary authorization to receive wages on a payroll card (proposed § 388-2(e)(2))***

Proposed section 388-2(e)(2) requires voluntary authorization before an employee receives wages on a payroll card. Substantively, we would like to see the provision revised to permit authorization by other verifiable form such as electronic verification or verification over the telephone. This is because many employers today utilize employee self-service, allowing employees to enroll in benefits, change contact information, elect their payment options, etc. online or over the telephone.

We also find this paragraph difficult to understand in that it expresses numerous concepts in one long sentence, and includes disclosure requirements that are redundant with paragraph (e)(11). To ease understanding, we recommend that the provision be revised as follows, which we believe maintains the intent of the provision:

> The employee has voluntarily authorized the payment of wages using a pay card in writing or other verifiable form, provided:
>
> (A) The employee's voluntary authorization is obtained without intimidation, coercion or fear of discharge or reprisal of refusal to accept the pay card or pay card account, and
>
> (B) The employee has provided the employee with a separate written form setting forth the disclosures required by Paragraph 11, including a clear, conspicuous, and complete itemized list of any fees assessed for the use of the pay card. The form must be provided to the employee in plain language in at least ten-point font.

Additional Recommended Revisions

1. ***Advance notice of changes in terms and conditions (proposed § 388-2(e)(15))***

Proposed section 388-2(e)(15) requires that employees be provided with 30 days advance notice of changes in terms and conditions of the payroll card account. Again, we agree with the intent of the provision but are concerned that, as written, it will be difficult for employers to satisfy this requirement. This is because federal banking law requires financial institutions to provide changes in terms and conditions 21 days before the change takes effect. Employers may not be able to comply with this requirement if they have not yet been apprised by the financial institution of future changes. For this reason, we recommend that this provision be revised to require 21 days advance notice of any changes.

2. Limitation on employer responsibility (APA proposed § 388-2(e)(16))

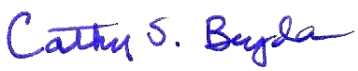
Finally, SD 1 imposes a number of provisions designed to protect employees who receive wages using a payroll card. While we agree that many of these requirements are important, we shouldn't lose sight of the fact that the bill is amending Hawaii's wage and hour statutes – governing employers – and not its statutes governing financial institutions. Many payroll cards today are portable, meaning that they can be used long after the employment relationship has ended and can receive loads of funds from sources other than the employer. To clarify that the provisions of HB 1814 apply only during the employment relationship and only while the card is being used as a vehicle of wage payment, we strongly recommend that the following provision be added to the bill:

> (e)(16) The employer's obligations under this subparagraph (e) shall cease: (1) 30 days after the employer-employee relationship ends and the employee has been paid his or her final wages, or (2) the pay card account has not received wage deposits from the employer for 90 days, whichever occurs first.

Conclusion

We would welcome the opportunity discuss the above issues with you further. In this regard, please feel free to contact Cathy Beyda (650-320-1824) or Bill Dunn (202-232-6889) with any questions or concerns that you may have.

Sincerely,



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