



American Payroll Association

Government Relations • Washington, DC

RESPONSE TO THE UNITED STATES DEPARTMENT OF LABOR REQUEST FOR COMMENTS

"Updating Regulations Issued Under the Fair Labor Standards Act"
Regulatory Information No. 1215-AB13

Introduction

The American Payroll Association (APA) submits the following comments in response to the Wage and Hour Division's July 28, 2008, Notice of Proposed Rulemaking and Request for Comments, RIN 1215-AB13. In the Notice, the Division requests comments on a number of proposed revisions to its regulations implementing the Fair Labor Standards Act of 1938 (FLSA) and the Portal to Portal Act of 1947. The proposed revisions are deemed necessary to update provisions that have been rendered out-of-date by subsequent statutory amendments and judicial decisions.

The APA respectfully requests that the Division also consider revising 29 C.F.R. §531.27, entitled *Payment in cash or its equivalent required*, to conform to other recent regulatory developments and in light of modern wage payment technologies. Specifically, we urge the Division to add the following language to section 531.27:

Nothing in sections 6 and 7 of the Act prohibits an employer from delivering cash wages to an employee: (1) by electronic fund transfer or deposit to an automated clearinghouse member financial institution account designated by the employee, or (2) on a payroll card established directly or indirectly through an employer which provides the employee access to his or her wages on payday.

The American Payroll Association

The APA is a nonprofit professional association representing more than 24,000 individuals 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. The APA also 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.

Modern Wage Payment Technologies

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. The Federal Deposit Insurance Corporation also has recognized increased acceptance and use of payroll cards

and has issued proposed regulations in response. *See*, 70 Fed. Reg. No. 1515, p. 45571 (2005). On the state level, nearly a third of the states have amended their wage payment statutes and/or regulations to specifically address payroll cards, and the law and/or administrative enforcement positions in at least 18 states can be interpreted as allowing employers to use electronic wage payment methods as the exclusive means of compensating their employees. In addition, dozens of federal, state, and local government departments and agencies now compensate their own employees using payroll cards. It is also worth noting that over half of the states use debit cards for electronic delivery of state government benefits such as unemployment insurance payments, aid to families and child support. Indeed, the federal government is embarking on the use of debit cards for electronic payment of social security benefits. This growing wave of electronic payment specifically using a debit card, similar to a payroll card, clearly shows that this payment medium has moved into the mainstream.

The Statute and Regulations

The FLSA establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting workers in the private sector and in Federal, State and local governments. Although the Act does not expressly address method of wage payment, the regulations implementing the FLSA require payment of prescribed wages "in cash or negotiable instrument." 29 C.F.R. §531.27. The regulations also indicate that "scrip, tokens, credit cards, 'dope checks,' coupons and similar devices are not proper methods of wage payment under the Act." 29 C.F.R. §531.34.¹ The regulations recognize, however, that other federal, state and local laws regulate wage payment issues, including the manner of wage payment, and declare that "nothing in the Act, the regulations, or the interpretations announced by the Administration should be taken to override or nullify the provisions of these laws" so long as they do not contravene the requirements of the Act. 29 C.F.R. §531.26.

Although the FLSA does not address electronic wage payment methods, another federal statute, the Electronic Fund Transfers Act (EFTA), does touch upon this issue. The EFTA together with the Federal Reserve Board's Regulation E make it unlawful for any person to require a consumer, as a condition of employment, to establish an account with a particular financial institution for the receipt of electronic fund transfers (EFTs). 15 U.S.C. §1693k(2); 12 C.F.R. §205.10(e)(2). This provision, known as the "compulsory use provision," prohibits an employer from requiring its employees to receive their wages by direct deposit to a particular financial institution. (Supplement I to Part 205 - Official Staff Commentary). An employer may, however: (1) require direct deposit of wages by electronic means if employees are able to choose the institution that will receive the direct deposit, *or* (2) give employees the choice of having their wages deposited at a financial institution designated by the employer or receiving their salary by another means. *Id.* In the past, the APA has been advised informally that the Division defers to Regulation E on issues relating to electronic wage payment.

Recent Developments and Need for Clarification

On January 10, 2006, the Federal Reserve Board (Board) issued an interim rule making clear that payroll cards established directly or indirectly by an employer on behalf of a consumer, to which electronic fund transfers of the consumer's compensation are made on a recurring basis, are covered by Regulation E. 12 C.F.R. §205.2. With respect to the "compulsory use provisions," the Board stated:

The Board believes the compulsory use provisions apply to payroll card accounts because they are established as accounts for the receipt of EFTs of salary. However, provided

¹ The regulations addressing method of wage payment were adopted in 1967 and have not been amended since that time. In its Field Operations Handbook, the DOL appears to recognize direct deposit as a permissible form of wage payment, at least when voluntary. Field Operations Handbook, ¶30c00(b).

that an employer does not require a consumer to obtain a payroll card account as the method of receiving pay, and permits, for example, a consumer to receive pay via direct deposit to a financial institution, the compulsory use prohibition should not be implicated.

71 Fed. Register 1473, 1479 (January 10, 2006). Thus, for employers that offer direct deposit to their employees, the payroll card simply represents another choice of financial institution into which the employees' net pay can be deposited. Accordingly, an employer may comply with the EFTA and Regulation E by offering its employees the choice of payment by direct deposit or on a payroll card.

Conclusion

Nothing in the FLSA prohibits delivery of cash wages to employees by direct deposit or on a payroll card so long as the Act's minimum wage, overtime and recordkeeping requirements are satisfied. In fact, it is not even clear whether the FLSA was intended to regulate the method of wage payment at all. Unlike the statute itself, however, the regulations implementing the FLSA briefly address certain methods of wage payment. These regulations were written before modern technologies were envisioned, and it is unclear how they apply to direct deposit and payroll cards. The Department's Field Operations Handbook briefly mentions direct deposit, but further clarification is necessary so that employers can make informed decisions when compensating their employees while feeling confident that they are complying with applicable wage and hour law.

For the above reasons, the APA urges the Division to revise 29 C.F.R. §531.27, as suggested above, in light of recent regulatory developments and modern wage payment technologies. For your convenience, we have enclosed a background paper on payroll debit cards that includes excerpts of laws and regulations enacted in the various states that have addressed the issue to date. The background paper also discusses the many benefits of payroll cards, both to employers and employees, which no doubt have resulted in the increased use and demand for the cards.

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



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

A handwritten signature in black ink, appearing to read 'William Dunn', with a stylized flourish at the end.

William Dunn, CPP
American Payroll Association
Manager of Government Relations