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December 21, 2018

Ms. Victoria Hassid
Deputy Director of Legislation and Policy
Department of Industrial Relations

Mr. Ralph Lightstone
Director of Legislation
California Labor and Workforce Development Agency

Ms. Julie Su, California Labor Commissioner California Labor and Workforce Development Agency 800 Capitol Mall, Suite 5000 Sacramento, CA 95814

Re: Early Access to Earned Wages

Dear Ms. Hassid, Mr. Lightstone and Ms. Su:

Thank you for taking the time to meet with us on August 13 to discuss concerns regarding PAGA and Labor code Section 226. You may recall we also spoke that day of the emerging technologies which enable employees to access earned wages prior to the next scheduled payday. These systems are overwhelmingly positive for workers, especially in contrast to costly pay-day loans, which are the alternative for too many California workers. We offered to follow up with a description of these programs, along with some possible points for guidance.

We have seen reports that more than 40 percent of Americans are unable to cover unexpected expenses of as little as \$400, forcing many workers to resort to pay-day lenders to cover problems such as car repairs.² Employers have been responding to requests for occasional early payment of wages earned (or to be earned) for many years. Recent advances in technology and practice have made it easier to offer early access to earned wages more routinely. Yet regulatory uncertainty remains a significant impediment: Employers and third parties are concerned about possible fines or lawsuits if they offer any employee benefit involving wage payments which is not expressly recognized by California laws or other guidance.

There are several ways in which employees might receive their earnings earlier than the normal schedule, including formal loans with promissory notes between employees and employers, and "off-cycle" payments of wages by employers, which are routine in all respects except that they are made

¹ For examples of such offerings, see www.payactiv.com, www.flexwage.com.

² Federal Reserve, <u>Report on the Economic Well-Being of U.S. Households in 2017</u>, May 2018, p.2.



early, at the request of the employee. For example, all tax withholding and wage statement requirements would apply. Early access to earned wages facilitated by third parties is a relatively new practice. The description below explains the current practices of which we are aware.

Early Access to Earned Wages Offered by Third Parties

One new factor is that the entity making the payment may not be the employer. With improved technology, banks or other third parties can access employer payroll or time-keeping systems, if authorized by a consumer, to verify the individual's hours worked or scheduled, and/or available earnings in the current pay period.

These arrangements are often offered directly to consumers by the third party. Employers have a limited role in these programs; generally only making employees aware of the option. Employers receive no direct or indirect payment from the third party for enabling early access to earned wages.

Funding

Consumers can typically opt-in to any number of ways to receive funds. Most employees simply identify their existing bank account. Others authorize a new account, which can be in the form of a prepaid debit card. Individuals must have a valid name/taxpayer identification number to enable an account to be established.

There are a variety of repayment arrangements. In some cases, an employee designates a new bank account to deposit her/his pay, where the vendor withholds the advanced funds and remits the remaining funds to the employee's existing account. Another alternative involves the consumer authorizing the third party to debit her/his bank account for the advance and any fees on the next pay day. In other cases, the employee will authorize a voluntary deduction from pay, and the employer would deduct and remit those funds to the designated recipient on pay day.

The third party vendor absorbs any risk of loss. If the vendor is unable to recover an amount from subsequent payments of wages, the vendor cannot pursue the amount in question by any other means.

Costs

The ability to efficiently access earned wages early is overwhelmingly positive for employees, and would almost certainly be the least-costly means of obtaining emergency spending money. The unfortunate alternative for too many California workers is pay-day loans. According to the association representing California payday lenders and check cashers, payday loans must be offered with fixed, up-front fees, with loans limited to \$255, for which a fee of \$45 would apply. The Consumer Financial Protection Bureau (CFPB) notes that "a fee of \$15 per \$100 is common."

³ https://www.cfsponline.com/facts/

⁴ https://www.consumerfinance.gov/ask-cfpb/what-are-the-costs-and-fees-for-a-payday-loan-en-1589/



In contrast, the new offerings described in this letter generally cost about as much as an out of network ATM transaction fee. Some third parties charge a periodic participation or membership fee which is not transaction-based, but rather covers an annual, quarterly or other time period. In addition to early access to earned wages, some programs include a variety of related benefits, such as online bill payment services, budgeting tools, online financial counseling and financial literacy materials.

Wage Statements

Since third-party payments are not wages, amounts paid early would not be accompanied by a wage statement; e.g., identifying the period start and end dates, hours, commissions, and so on. Instead, a fully compliant wage statement would be provided by the employer on the regularly scheduled pay day, showing the deduction or direct deposit into the specified account.

Amounts Available May Vary

Employees are typically offered a percentage of estimated earnings, such as 40% or 50%, to permit withholding of taxes, retirement savings, health insurance and so on with the next regular payroll. Since accurate calculations of overtime pay may not be possible until the end of the payroll period, a program might offer an amount based only on the straight-time value of hours worked.

Other types of earnings could also be excluded from consideration, such as paid time off (e.g., vacation/sick leave). Certain types of paid time off are only entered into payroll systems at the end of the payroll period. The third party advancing the funds would explain any such limitations, and all overtime and other types of earnings would be paid with the regularly-scheduled payroll.

Such programs typically have consumer protection features that discourage or prohibit routine use; for example, by permitting only one request per pay period, and only one outstanding amount at a time. Some programs may limit access to a certain number of transactions per year.

LWDA/DIR Could Shape Such Offerings to Benefit Employees

These advances in technology and practice represent a substantial improvement for workers, who are now able to access earned wages to meet everyday emergencies without resorting to costly pay-day lending. However, regulatory uncertainty has hindered availability in California.

California Labor and Workforce Development Agency and Department of Industrial Relations could facilitate the availability of such programs by merely acknowledging them and noting any obvious prohibitions. For example, LWDA/DIR could offer new "Frequently Asked Questions" on the topic, noting that employers are not permitted to receive any direct or indirect benefit for enabling early access to earned wages. We reviewed the Division of Labor Standards Enforcement website, and the DLSE Enforcement Policies and Interpretations Manual, but found no guidance on these matters.



We would appreciate the opportunity to meet with you again to understand your views concerning these programs and the elements outlined above. With your permission, I will follow up to suggest a meeting date in the coming weeks. Again, we greatly appreciate the opportunity to explore these important emerging practices with you. Please let me know if we can be of service in the meantime.

Sincerely,

Pete Isberg

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⁵ The National Payroll Reporting Consortium ("NPRC") is a non-profit trade association whose member organizations provide payroll processing and related services to nearly two million U.S. employers, representing over 36% of the private sector workforce. Payroll service providers improve efficiency and reporting through electronic payment and reporting programs, and improve employer compliance.