

HB 1814 HD2

SD1

Measure Title: RELATING TO PAYMENT OF WAGES.

Report Title: Direct Deposit; Electronic Transfer; Pay Cards; Methods of Wage Payment

Description: Clarifies that employers may pay wages by direct deposit under certain conditions. Allows employers to pay wages by pay cards under certain circumstances. Makes employers responsible for any fees incurred if an employer has insufficient funds in their bank account for the electronic transfer. Effective July 1, 2112. (SD1)

Companion:

Package: None

Current Referral: JDL, CPN

Introducer(s): RHOADS



NEIL ABERCROMBIE
GOVERNOR

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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014

TUESDAY, MARCH 25 2014
10:30 A.M.

WRITTEN COMMENTS ON HOUSE BILL NO. 1814, H.D 2, S.D. 1,
RELATING TO PAYMENT OF WAGES.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE BRIAN T. TANIGUCHI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs, Office of Consumer Protection ("OCP") appreciates the opportunity to offer written comments on H.B. 1814, H.D. 2, S.D. 1, Relating to Payment of Wages. My name is Bruce B. Kim and I am the Executive Director of OCP.

H.B. 1814, H.D. 2, S.D. 1 provides definitions for "electronic transfer", "pay card", and "pay card account". It also sets the conditions under which an employer may offer payment to an employee via direct deposit of funds through electronic transfer, or via a pay card.

OCP notes that numerous consumer protection concerns have been raised throughout the nation over the use of payroll cards (i.e. "pay cards"). These concerns deal primarily with the lack of regulation on the number and type of fees imposed when the cards are used and lack of transparency associated with inadequate or non-existent disclosures of fees and conditions to unsuspecting workers who are paid via payroll cards.

OCP supports the direct deposit aspects of this legislation, but continues to have reservations about allowing the use of payroll cards. Proponents of payroll cards have repeatedly highlighted the benefits gained by the "unbanked", that is, persons who do not have a checking or savings account. Yet, in all of the hearings this legislation has had, not one unbanked person, or any organization representing unbanked persons, has seen fit to submit testimony in support of allowing employers to pay their employees with payroll cards. OCP defers to and supports the recommendations of the Department of Labor and Industrial Relations regarding this legislation.

Thank you for allowing me to offer written comments. If members of the committee have any questions, I would be happy to answer them.



**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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March 25, 2014

To: The Honorable Rosalyn H. Baker, Chair,
The Honorable Brian T. Taniguchi, Vice Chair, and
Members of the Senate Committee on Commerce and Consumer Protection

Date: Tuesday, March 25, 2014
Time: 10:30 a.m.
Place: Conference Room 229, State Capitol

From: Dwight Y. Takamine, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 1814 HD2 SD1 Relating to Payment of Wages

I. OVERVIEW OF PROPOSED LEGISLATION

HB1814HD2SD1 proposes to amend Chapter 388, Hawaii Revised Statutes (HRS), to clarify that wages may be paid through electronic transfer by direct deposit and by pay cards.

After learning more about how these pay cards work and there still being numerous questions, the DLIR respectfully requests that the measure be held or only the provisions pertaining to direct deposit move forward.

II. CURRENT LAW

The intent of chapter 388, HRS, is to protect the payment of workers' wages and other compensation. The intent of the Legislature in chapter 388, which is clear and unambiguous in its plain language, is also to encourage employers to pay wages promptly and reduce workers' economic losses.

III. COMMENTS ON THE HOUSE BILL

The intent of this measure is to ensure financial institutions are able to make money on transactions made by workers. Obtaining profits off the backs of workers' and their hard-earned pay while inconveniencing them is counter to the intent of chapter 388.

§388-6 Withholding of wages only permits two kinds of specific deductions from employee's paychecks:

1. "...except where required by federal or state statute or by court process..."

2. " or when such deductions or retentions are authorized in writing by the employee," This provision was intended for deductions for fringe benefits like health insurance, retirement payments, etc.

Moreover, under §388-10, a violation of §388-6 subjects the employer to a civil penalty of twice the unpaid wages, plus interest at 6% per year. Clearly, the statute provides very strong protections for the wages due workers.

The department understands that these cards work essentially in the same fashion as gift cards and workers will not be able to directly pay rent or bills with them. Rather, the cards are designed for merchants, financial institutions, and third party processors to earn fees. The department does not understand how the fee mechanisms operate with these cards.

The department also does not understand what consumer protections are associated with these cards and what the security standards are in place to insure against identity theft and other protections.

The department has numerous questions about these cards and respectfully requests that the Committee hold the measure to allow more discussion on the merits of the proposal. Enactment of law on the subject of these complex pay mechanisms at this time may be premature and the consequences severe for workers.

If the Committee moves this measure forward with only direct deposit provisions, the department suggests the following definition for electronic transfer:

"Electronic transfer" means any transfer of funds, other than transactions originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal or computer so as to order, instruct, or authorize a depository institution to debit or credit an account.

Section 3 should also be retained if the committee moves the direct deposit provisions forward.

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March 25, 2014

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
and members of the Senate Committee on Commerce and Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1814, S.D. 1 (Payment of Wages)**
Decision making Date/Time: Tuesday, March 25, 2014, 10:30 A.M.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** (“HFSA”). The HFSA is a trade association for Hawaii’s consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA opposes certain provisions in the S.D. 1 version of this Bill, and requests that this Bill be amended.

The stated purposes of this Bill are to: (1) clarify that employers may pay wages by direct deposit under certain conditions; (2) allow employers to pay wages by pay cards under certain circumstances; and (3) make employers responsible for any fees incurred if an employer has insufficient funds for the electronic transfer.

1. HFSA’s previous testimonies on this Bill.

The HFSA had submitted testimonies on this Bill to the House Consumer Protection and Commerce Committee (“House CPC Committee”) and the Senate Judiciary and Labor Committee (“Senate JDL Committee”). Those testimonies discussed “**what are pay cards**”, “**benefits of pay cards**”, “**pay cards are already subject to consumer protections**”, and “**consumer protection provisions in this Bill**”.

The HFSA incorporates those testimonies by reference in this testimony.

2. Pay cards in Hawaii.

For the Senate JDL Committee hearing on March 18, 2014, the Department of Labor & Industrial Relations (“DLIR”) submitted testimony stating that the “department began allowing the payment of wages by electronic pay cards under the previous administration”. We understand that this was based on a Declaratory Order of April 13, 2006.

Since the time that the Declaratory Order was issued nearly 8 years ago, and over the course of two State Administrations, we understand that there are now approximately 14,000 employees in Hawaii who receive their wages through pay cards.

According to the Senate JDL Committee Report for this Bill dated March 21, 2014, the “Director of Labor and Industrial Relations recently issued a notice that the Department is suspending its policy allowing the use of payroll or debit cards until the Legislature address [sic] this policy issue.” (There was no mention at the Senate JDL Committee hearing on this Bill on March 18, 2014 that the DLIR Notice had been or was being issued.)

In the undated “Notice”, the DLIR announced that it is “suspending the guidelines based on the declaratory order of April 13, 2006, concerning the use of Payroll / Debit Cards with restrictions, effective May 1, 2014. . . . The department will therefore, suspend its policy allowing the use of payroll/debit cards pending legislative resolution.” (emphasis added.)

3. Hearings on and amendments to this Bill.

a. House hearings and amendments.

This Bill is not an Administration Bill. As introduced on January 21, 2014 by Rep. Rhoads, this Bill was written to ban the use of pay cards in Hawaii: “**An employer shall not pay wages due to the employer's employees by use of a pay card, debit card, automated teller machine card, or similar means of an electronic payment card onto which an employer, or an entity on an employer's behalf, transfers or loads the employee's wages.**” (emphasis added.)

At a House Labor and Public Employment Committee (“House LAB Committee”) hearing on this Bill on January 24, 2014, there were testimonies in opposition to this Bill. After the hearing, the Bill was amended as House Draft 1. The House LAB Committee Report said that “your Committee has amended this measure by **permitting an employer to pay wages by pay card, debit card, automated teller machine card, or similar means of an electronic payment card under the following circumstances: . . .**” (emphasis added.)

A House CPC Committee hearing was held on the H.D. 1 version of this Bill on February 19, 2014. Proposed amendments to this Bill were made by some of the organizations, including the HFSA, which were opposed to the original version of Bill. After the hearing, the Bill was amended in the form of a House Draft 2. The House CPC Committee Report said:

“Your Committee has amended this measure by, among other things:

...

(4) Amending the criteria that must be met to pay wages by use of a pay card or similar means of electronic payment card to include that:

(A) The employee has voluntarily authorized, in writing, the payment of wages using a pay card or other similar means of electronic payment card;

(B) The pay card issued to the employee must be a network branded pay card;

(C) The employee must have the ability to withdraw the employee's full net wages at least once per payroll period without incurring any costs or fees;

(D) The employer must assume or other otherwise absorb any fees or costs imposed by a financial institution for certain services;

(E) None of the employer's costs associated with the pay card account may be passed on to its employees;

(F) The employer must ensure that the employee is provided liability protections against fraud associated with the use of an employer issued pay card or similar means of an electronic pay card; and

(G) The employer must provide an employee a written notice form specifying certain information when offering an employee the option of receiving wages using a pay card or similar means of an electronic payment card; . . .”

The HFSA and others contend that the amendments in the H.D. 2 enhanced and strengthened the employee protection and consumer protection provisions which were in the H.D. 1.

b. Senate hearings and amendments.

As mentioned earlier, a Senate JDL Committee hearing was held on the H.D. 2 version of this Bill on March 18, 2014.

Some of the organizations which were opposed to the original version of this Bill, submitted testimony at the Senate JDL Committee hearing expressing their support for the H.D. 2 version and proposing certain amendments. These organizations include the American Payroll Association, the Hawaii Bankers Association, Visa, Inc., and the HFSA.

For the Senate JDL Committee hearing, the Division of Financial Institutions of the Department of Commerce and Consumer Affairs (“DFI/DCCA”) offered comments about revising the H.D. 2 to: (a) change the definition of “pay card”, (b) remove references to “similar means of an electronic payment card” as being a redundant reference to a pay card, and (c) delete language exempting pay cards from the Money Transmitters Act because if pay cards are required under this Bill to be issued by depository institutions, those institutions are already exempt from that Act. The HFSA and other organizations similarly supported the DFI/DCCA amendments. All those amendments are in the S.D. 1.

The DLIR offered other amendments for the Senate JDL Committee to consider.

Some of the other amendments in the S.D. 1 were not supported by the HFSA. Those amendments, which are described below in Section 7 of this testimony, should either be further amended or deleted in a Senate Draft 2 version of this Bill.

4. Any concerns about pay cards have already been addressed in the H.D. 2.

Any concerns about pay cards that have been raised about this Bill have been addressed in

the H.D. 2. Here are the concerns:

a. When this Bill was still in the House, a concern was expressed by a legislator about what we understood to be an instance of a “mom and pop” employer in Hawaii who paid an employee with a “gift card” which could only be used at one specific store.

From our perspective, if an employee was paid wages through a “gift card” which could only be spent at one store, that card was not a “pay card” and that practice was improper, if not illegal.

This issue was addressed in the H.D. 2 which defined “pay card” to mean a “network branded prepaid card used by an employee to access wages from a pay account”. This provision is referred to in the House CPC Committee Report in item 4(B) above (see Section 3a, above, of this testimony).

A network branded pay card has, for example, a Visa or MasterCard logo. The branded cards can be used anywhere that payment brand is accepted. The employee can take the pay card to a financial institution that is a member of the brand and receive his or her full net wages at no cost from the bank teller at least once per pay period. There are over 300 financial institution (i.e. bank or credit union) branch locations in Hawaii and more than 90,000 branch locations on the mainland that accept either Visa or MasterCard.

b. When this Bill was still in the House, the ILWU Local 142 testified to the House CPC Committee about “debit or other pay cards”: “If the employee voluntarily chooses this method of payment, the practice should be permitted. However, the choice should be the employee’s, not the employer’s.” (emphasis added.)

The ILWU’s concerns are specifically addressed by the provisions in the H.D. 2 which are referenced in the House CPC Committee Report as items 4(A) and (G) above (see Section 3a, above, of this testimony).

c. For the Senate JDL Committee hearing, there was one identical concern raised about pay cards in three of the testimonies (Americans for Democratic Action/Hawaii, Progressive Democrats of Hawaii, and an individual). The three testimonies described an employee who “was being paid his wages in the form of a debit card and there was only one location, on the entire island of Oahu [a WalMart store on Keeaumoku Street] where he could redeem his pay without paying a transaction fee.”

We stated at the Senate JDL Committee hearing that we agreed with that concern. We noted that this was already specifically addressed in the H.D. 2 which defined the pay cards as “network branded prepaid cards”. The H.D. 2 also mandates that the employee must have the ability to withdraw the employee’s full net wages at least once per payroll period without incurring any costs or fees.

5. Administration testimonies on this Bill.

The DLIR submitted testimony for all three hearings on this Bill (House LAB Committee on January 24, 2014, House CPC Committee on February 19, 2014, and Senate JDL Committee on March 18, 2014). The Office of Consumer Protection of the Department of Commerce and Consumer Affairs similarly provided testimony at the three hearings. The DFI/DCCA offered

testimony at the Senate JDL Committee hearing.

None of the Administration testimonies cited any specific complaints or concerns made by any Hawaii employees or anyone else in Hawaii about pay cards in Hawaii since the time that pay cards were allowed by the DLIR 8 years ago in 2006.

6. California Governor Brown's approach to a pay card bill should be used on this Bill.

In 2011, the California legislature sent a pay card bill to Gov. Edmund ("Jerry") Brown, Jr. In his veto message, Gov. Brown wrote:

"I am returning Senate Bill 931 without my signature.

"Pay cards provide workers without bank accounts a way of avoiding high check cashing fees. They are now used by thousands of California employees and employers. This bill seeks to contain costs for workers who choose to accept pay cards, a goal with which I agree.

"Unfortunately, this bill goes too far. It would impose numerous and costly new requirements on pay card providers. A likely result of these mandates is that banks and employers may simply stop offering this service, injuring the very workers this bill aims to protect.

"I strongly believe that reasonable protections are needed for those who use pay cards. I will work with the bill's proponents and the financial institutions to forge a better solution that I can sign into law." (Emphasis added.)

We believe that Gov. Brown's sound, balanced approach should be used by the Hawaii Legislature as it considers the provisions in the S.D. 1 which had been added to the H.D. 2 and which we suggest be amended or deleted.

7. Suggested amendments to this Bill.

As mentioned above, some of the amendments in the S.D. 1 were not supported or agreed to by us. Those amendments should either be further amended or deleted in a Senate Draft 2 version of this Bill.

We understand that the testimonies of the Hawaii Bankers Association and the American Payroll Association recommend how this Bill should be amended. We agree with their suggestions.

Here are some of the proposed amendments to this Bill:

1. At the outset, it is clear that complicating this Bill is the DLIR's recently issued Notice to suspend its policy allowing the use of pay cards effective May 1, 2014. It is uncertain if this Bill, even on a fast track, can be enacted into law by that date.

The DLIR should withdraw that Notice so that the DLIR's Declaratory Order dated April 13, 2006 can remain in effect until the law's effective date.

The effective date in the S.D. 2 version of this Bill should be a date sufficiently after this Bill is signed into law so that all employers, employees, payroll companies, program managers, issuers, and others have sufficient time to be familiar and in compliance with the new law.

A savings clause (i.e. grandfather provision) should be added in the S.D. 2 to preserve any rights of employers who have issued pay cards based on the DLIR's Declaratory Order dated April 13, 2006.

2. On page 5, beginning on line 17, paragraph (e)(4) states:

"(4) 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 or fees;"

We understand that, except for Vermont, in all other states with pay card laws, the requirement is there should be at least one free withdrawal of the full net wages per payroll period.

A Hawaii employee with a network branded type of pay card (which is what the definition of "pay card" is in the S.D. 1) can take that pay card to a financial institution that is a member of the brand and receive his or her full net wages at no cost from the bank teller at least once per pay period. There are over 300 branch locations in Hawaii. Additionally, with a pay card, there are many ways for an employee, without costs or fees, to make point-of-sale purchases, receive cash back from point-of-sale transactions, do purchases by mail, phone, or the internet, and pay bills online.

Because pay card products are generally issued nationwide by depository institutions, the terms of these products need to be uniform and consistent. Hawaii should not be out of step on pay card provisions, such as this one, otherwise issuers could stop issuing this product in Hawaii.

Accordingly, this paragraph should be amended to use the H.D. 2 wording of "at least one time".

3. On page 5, beginning on line 2, paragraph (e)(2) requires voluntary authorization on a separate form that includes an itemized list of fees and that the form be provided to the employee.

This provision would make it impossible to provide consent using a self-service system.

While this Bill can require that the disclosure be provided to the employee in writing, the Bill should be amended to state that the consent be "in writing or other verifiable form". This wording was in the H.D. 2.

4. On page 8, beginning on line 5, paragraph (e)(12) states:

"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 employee's creditors."

This wording is problematic because this is not how all pay card accounts are structured. Many accounts are pooled accounts.

This Bill should be amended to permit pooled accounts are permitted, as long as each sub-account is for the sole and exclusive benefit of the named employee. The amendment would require that the employee's pay card account must be eligible for deposit insurance on a "pass through" basis. The requirements for "pass through" insurance are: (a) 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"); (b) 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 (c) the funds in the account must actually be owned by the individual cardholders under an agreement among the parties or pursuant to applicable law.

5. On page 8, beginning on line 14, paragraph (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.

This provision appears to be based on the Vermont law. However, there are really two separate issues: (a) providing a new card before the expiration date at no cost, and (b) providing a new card each year, which really should be only at the employee's request.

This Bill should be amended accordingly.

That same paragraph (e)(14) states on line 17 that a replacement card "may not be issued" if the pay card has been inactive for 12 months or the employee is no longer employed by the employer.

The "may not be issued" phrase should be changed in the S.D. 2 version to "need not be issued".

6. On page 9, beginning on line 21, paragraph (e)(15) requires employers to provide 30 days prior notice of any change in terms. Regulation E of the Federal Electronic Fund Transfer Act requires that financial institutions provide this information 21 days before a change goes into effect. (Even the Vermont statute requires 21 days, not 30 days.)

The "thirty days" wording should be changed to "twenty one days".

7. The HFSA and others are still reviewing the S.D. 1 to identify any additional provisions needing amendments. We will let your Committee know shortly if there are such provisions.

Conclusion.

We believe that besides paying employees through paper checks, employers should have the option to pay their employees by pay cards or by direct deposits to bank accounts. We also believe that employees should be able to decide, after full disclosure, if they want to be paid their wages through pay cards. We support reasonable provisions concerning pay cards which ensure that (a) employees are provided with full and free access to their entire net wages each pay period without cost, and (b) consumer protections and employee protections are in place.

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
and members of the Senate Committee on Commerce and Consumer Protection
House Bill 1814, S.D. 1 (Payment of Wages)
Page 8

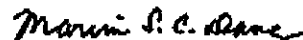
Pay cards provide a valuable benefit to an “unbanked” employee or an “under-banked” employee (collectively called an “underserved employee”). Without pay cards, an underserved employee, who receives a paper paycheck, might use expensive alternative financial services, such as check cashers, to access his or her wages. The underserved employee could also incur additional costs to buy money orders to pay bills.

If the S.D. 1 is amended as we suggest in the form of a proposed S.D. 2, we believe that those objectives will be achieved.

However, if this Bill contains unreasonable restrictions or provisions, issuers will undoubtedly decide not to continue to issue pay cards in Hawaii. The ones who will lose are the 14,000 employees in Hawaii who are being paid through pay cards.

Accordingly, we ask that this Bill be amended as suggested above.

Thank you for considering our testimony.



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Presentation To
Senate Committee on Commerce and Consumer Protection
March 25, 2014 at 10:30AM
State Capitol Conference Room 229

Testimony Requesting Amendments to House Bill 1814, HD2, SD1

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Members of the Committee

My name is Edward Pei and I am the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing eleven FDIC insured depository institutions operating in the State of Hawaii.

The Hawaii Bankers Association supports the intent of HB 1814, HD2, SD1 which will modernize state statutes to reflect current practices in the payment of wages to employees. Approximately 85% of all employees in Hawaii today are paid by direct deposit to their bank account. Another approximately 14,500 employees are receiving their wages through a payroll card, or pay card. Both alternatives are far more expedient, convenient, and less expensive than receiving a paper paycheck twice or more per month. We firmly believe that employees should be given a choice when it comes to how they receive their wages, with full disclosure as to the rules and fees associated with each alternative.

We understand that the Director of Labor and Industrial Relations (DLIR) recently issued a notice that the Department is "suspending the guidelines based on the declaratory order of April 13, 2006, concerning the use of Payroll / Debit Cards with restrictions", effective May 1, 2014. We do not understand this action, as it seems premature to issue this notice with HB1814 pending. In any case, should payroll cards be banned in Hawaii, it will cause undue hardship to the thousands of employees currently receiving their wages via a payroll card. As many of these employees either do not have bank accounts or prefer to use other non-bank financial services, the only remaining alternative for them is to receive a paper paycheck. To cash those paychecks, they likely will have to visit a check casher, who charges fees up to 5% of the face amount of the check to provide the service. Therefore we urge passage of this measure, with appropriate direction to DLIR to rescind their notice regarding the ban on payroll cards.

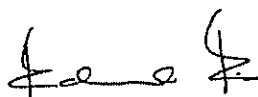
Frankly, there are no banks in Hawaii today that issue the payroll card product. Supporting the product would require investment in systems upgrade and the product would at best be marginally profitable, with proper scale. In fact, there are very few banks in the country who offer this product today. With Hawaii being a small market, we need to ensure that the payroll card continues to be a viable alternative for the employees in Hawaii. That would mean not over-regulating this product to make it prohibitive for card issuers to continue to offer the product here.

We think it is important to conform to the programs in other states, so that card issuers and program administrators can easily continue their programs without modifying systems, procedures, and documentation. We have already heard one program administrator who indicated they would stop issuing payroll cards in Hawaii should the measure in its current form be approved. Therefore, the following changes are recommended:

- 1) Authorization in Writing (page 5, item 2): many of these programs allow for self service electronic enrollment options. So, authorizations in writing can be an alternative but not the sole alternative.
- 2) Withdrawal of Full Net Wages (Page 5, item 4): the current wording is significantly flawed. Most other programs provide one free withdrawal of the employee's full net wages. Some programs allow for more. Also, these cards can always be used without fee to withdraw cash in other ways.
- 3) Notice of Change in Terms (Page 8, item 15): The Electronic Funds Transfer Act (Regulation E) provides ample consumer protections for all electronic transactions, including those with a payroll card. Their requirement is 21 days notice for changes, not the 30 days required in this bill. While seemingly harmless, this change would require programs to make changes to all their disclosures and documentation.

There are some other changes in this bill advocated by the American Payroll Association and the Hawaii Financial Services Association. We agree with those amendments and support the clarifications it offers.

Thank you for the opportunity to submit testimony on this important measure and we urge passage with the amendments as proposed. We would be happy to answer any questions you may have.



Edward Y. W. Pei
(808) 524-5161



Chamber of Commerce HAWAII

The Voice of Business

**Testimony to the Senate Committee on Commerce and Consumer Protection
Tuesday, March 25, 2014 at 10:30 A.M.
Conference Room 229, State Capitol**

RE: HOUSE BILL 1814 HD2 SD1 RELATING TO PAYMENT OF WAGES
(REVISED)

Chair Baker, Vice Chair Taniguchi, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** HB 1814 HD2 SD1, which clarifies that employers may pay wages by direct deposit under certain conditions; allows employers to pay wages by pay cards or similar means of electronic payment card under certain circumstances; makes employers responsible for any fees incurred if an employer has insufficient funds for the direct deposit; and creates an exception to the State's Money Transmitters Act for use of pay cards that cannot be used internationally, be used for transfers from person to person, or be reloaded from a non-depository source. We would support the bill with certain amendments.

The Chamber is the largest business organization in Hawaii, representing over 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber believes that the restrictions in the current bill will force employers to stop offering the payroll card, which would in turn leave little alternative to the employee but to receive a paper paycheck. This would result in a less convenient and much more costly option for the employee. Many in Hawaii do not maintain bank accounts, or they opt for non-bank options to handle their financial needs. A recent FDIC study revealed that 3.8% of Hawaii households do not have bank accounts and another 20% utilize non-bank services, such as check cashers and money orders. For these consumers, the most convenient and least expensive option to receive their wages is a payroll card.

HB 1814 HD2 SD1 seeks to require the employer to absorb all of the incidental bank fees that the employee might incur. The employer has no control over how the employee chooses to manage the funds and how the employee chooses to use the payroll card. These incidental bank convenience fees are paid by all consumers today, should they choose to take advantage of the conveniences available today with certain electronic banking alternatives. Asking the employer to bear these costs would be like asking an employer to also be responsible for the bank service fees of an employee who receives their wages in their bank account via direct deposit. We do agree that the employer should be responsible for any fees associated with disbursement of the funds into the account, or any other fees related to the administration of the payroll card program.



Chamber of Commerce HAWAII

The Voice of Business

It is important to note that accepting the payroll card as the means to receive their wages is completely voluntary. All existing payroll card programs provide full and complete disclosure of any usage fees before the employee enrolls in such a program. The employee can also terminate their enrollment at any time. Therefore, the employee has utmost control over the acceptance and use of the product. You will find that the vast majority of consumers who have chosen this product value it greatly and sing praises for the conveniences it provides.

Many employers are unwilling to absorb the avoidable bank fees and have indicated that they will terminate their payroll card programs should they be required to do so. That means the only alternative left for the employee is to receive a paper paycheck. If that employee does not have a bank account, they may have to resort to utilizing a check casher to cash their paycheck which **charges fees**.

We ask that the committee eliminate this onerous and unreasonable requirement by considering the following amendments, as offered by APA:

1. Employers who offer payroll cards should be required to use payroll cards that are issued by banks or credit unions whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Association (NCUA). This will protect employees who select the payroll card option in the unlikely event that the issuing financial institution becomes insolvent.

2. The bill should be limited to payroll cards. It should not authorize the payment of wages using "similar means of electronic payment card" that are unidentified and may or may not carry the same consumer protections as payroll cards. Currently, only payroll cards are subject to Regulation E and its many consumer protections.

3. We urge the committee to remove the provisions added to HD2 relating to money transmission. Simply put, the issuance of payroll cards does not involve money transmission.

Thank you for the opportunity to testify.



Progressive Democrats of Hawai'i

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SENATE COMMITTEE ON CONSUMER PROTECTION

Sen. Rosalyn Baker, Chair

Sen. Brian Taniguchi, Vice Chair

Date: Tuesday, March 25, 2014

Time: 10:30 am

Place: Conference room 229

HB1814, HD2, RELATING TO PAYMENT OF WAGES

COMMENTS

My name is Bart Dame and I am testifying on behalf of Progressive Democrats of Hawaii.

We first became aware of the abuse of these payroll debit cards last year, when one of our members shared the experience of her teen-aged son, who was employed by a company we had considered to be a responsible company. He was being paid his wages in the form of a debit card and there was only one location, on the entire island of Oahu, where he could redeem his pay without paying a transaction fee. We were surprised to learn this. Subsequent meetings led to the drafting of the original version of this bill, which we supported.

Unfortunately, the bill was amended in a subsequent hearing in ways destructive to its original purpose. It appeared as if language from the credit card companies was inserted into the bill in order to render it almost useless. In our opinion, the most recent hearing in JDL improved the bill.

We do not oppose language which would legalize direct deposits as we agree those benefit both the employer and the employee. However, we do not agree that payroll debit cards are more advantageous to an employee than a paper check or cash payment. Both the payroll companies and the banking industry have demonstrated, in our eyes, bad faith in trying to profit from this mode of paying wages by shifting costs to the employee, with the financial institutions making small profits from the transaction charges as well as whatever portion of wages might remain on unredeemed, possibly lost debit cards.

Since the Department of Labor has issued a notice it has suspended the guidelines issued under the Lingle administration allowing the use of debit cards for payroll, we feel the original concerns which gave rise to this bill are satisfied by that action.

We would not oppose passage of HB1814 if it were restricted to authorizing direct deposit of wages into employees accounts, which, unlike the recent history of payroll debit cards, does not appear to lend itself to abuse. Thank you for this opportunity to testify.

The Senate
Twenty-Seventh Legislature
Committee on Commerce and Consumer Protection
March 25, 2014, 10:30 a.m.
Room 229

Statement of the Hawaii Regional Council of Carpenters on
HB 1814 HD2 SD1, Relating to Payment of Wages

The Hawaii Regional Council of Carpenters believes the Bill should be held. While various safeguards are attempted, certain realities of the working world are not overcome.

In the construction industry, a paycheck from a local bank can make the difference in being stuck trying to find a contractor that has completed a project with wages owed, and cannot be located. While it is our understanding that electronic transfers can be arranged by an employee, construction worker wage payments can be lost in the time it takes for a bank statement to be received.

Electronic transfers also require some direct action by the employee. While the Bill attempts to require employee action with clear options and protections (though without clear penalties for fraud), new hires are often met with fitting into "how things are done" in their new place of employment. If pay cards are the way in a given company, going along is a definite tendency. Finding a pay card deficiency may come too late to find the contractor.

While we think of these methods as the way of the future, they must become more familiar to employees before they become a barrier to tracking their wage payments. Confidentiality, identity theft protection, and other concerns must also be established.

Thank you for considering our testimony in opposition to HB 1814 HD2 SD1.



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

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))*

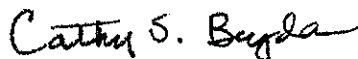
Finally, SD 1 imposes a number of provisions designed to protect employees who receive wages using a payroll card. While we agree that many of these requirements are important, we shouldn't lose sight of the fact that the bill is amending Hawaii's wage and hour statutes – governing employers – and not 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,



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



William Dunn, CPP
American Payroll Association
Director of Government Relations

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March 25, 2014

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
and members of the Senate Committee on Commerce and Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 1814, Senate Draft 1 (Payment of Wages)**
Decision-making Date & Time: Tuesday, March 25, 2014, 10:30 a.m.

I represent **Visa, Inc.** ("Visa"). Visa operates the world's largest retail electronic payments network providing processing services and payment product platforms. This includes consumer credit, debit, prepaid and commercial payments. Visa facilitates global commerce through the transfer of value and information among financial institutions, merchants, consumers, businesses, and government entities.

VISA offers comments on this Bill, and respectfully requests that this Bill be amended.

The stated purposes of this Bill are to: (1) clarify that employers may pay wages by direct deposit under certain conditions; (2) allow employers to pay wages by pay cards under certain circumstances; and (3) make employers responsible for any fees incurred if an employer has insufficient funds for the electronic transfer.

Visa agrees with the consumer protection provisions and the employee protection provisions concerning pay cards that were in the House Draft 2 version of this Bill before this Bill was amended by Senate Draft 1.

Visa urges your Committee to consider the testimonies about pay cards that we understand will be submitted on the Senate Draft 1 version of this Bill by the **Hawaii Bankers Association** and the **Hawaii Financial Services Association**. Visa concurs with their suggested revisions to the Senate Draft 1 version.

Thank you.

Marvin S. C. Dang

MARVIN S.C. DANG
for Visa, Inc.

(MSCD/Visa)