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NEWS FROM THE U.S. – PAYROLL CARDS GAIN WIDESPREAD ACCEPTANCE

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New Jersey recently became the latest state to update its regulations to reflect modern wage payment technologies. On October 6, 2008, the New Jersey Department of Labor and Workforce Development issued final regulations officially recognizing payroll cards as a permissible method of wage payment.

Fifteen states now address payroll cards in their wage payment statutes or regulations, and the vast majority of the remaining states (as well as the District of Columbia) have informally advised that payroll cards may be used to compensate employees. Representatives from only three states – Montana, New Mexico and Vermont – continue to express concern that a legislative amendment may be necessary before payroll cards can be utilized by employers in their states.

Benefits of Payroll Cards

A payroll card is a reloadable prepaid (i.e., stored value) card issued through a national or regional bank. Payroll cards usually are offered along with and as an alternative to direct deposit. Because applications, credit checks and personal bank accounts are not required, every employee is eligible to participate.

Inside

The use of payroll cards has increased dramatically over the past five years, due, no doubt, to the many benefits that the cards offer to employers and employees alike. From the employee's perspective, payroll cards eliminate check-cashing fees and remove delivery problems that often result when an employee is ill, or traveling, or working at a remote location. Payroll cards also facilitate the delivery of wages during 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 by traveling to a payment location to pay cash. These fees are eliminated when employees are paid on a payroll card.

For employers, the benefits of 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. Convenience to employees and prompt access to wages translates into increased morale and productivity among employees.

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State Law Treatment of Payroll Cards

As of 2003, no state had yet updated its wage payment statutes or regulations to address payroll cards. Today, the wage payment statutes or regulations in 15 states expressly authorize this method of wage payment. These states are Colorado, Delaware, Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Virginia and West Virginia.

The wage and hour enforcement agencies in the vast majority of the remaining states have advised that employers may use payroll cards provided certain conditions are met. Indeed, the laws or enforcement positions in 18 states can be interpreted as permitting employers to utilize electronic wage payment methods (i.e., direct deposit and payroll cards) as the exclusive means of compensating their employees.

Although the conditions imposed on the use of payroll cards vary from state to state, most states require that employees have access to their full wages on payday without discount. This means that employees must be able to withdraw or otherwise access their wages at least once each pay period without fees.

Access using an automated teller machine ("ATM") alone is unlikely to be sufficient because most banks limit the total daily amount that may be withdrawn from an ATM and because ATMs only dispense funds in $10 or $20 increments. Accordingly, most programs allow employees to access wages in other ways, such as from a bank teller, through the purchase of money orders, and/or through the issuance of convenience checks. Employees also may use their cards to make purchases at millions of merchants worldwide that participate in the debit card networks.

Other conditions that commonly are imposed on the use of payroll cards include employee consent, disclosure of terms including fees, and employee ownership of funds. Some states impose additional requirements. For example:

- Kansas requires that employers conduct training or distribute educational materials 30 days before implementing a program that includes payroll cards.
- Minnesota requires that the payroll card issuer file a notice with the Labor Commissioner containing the entity's name, address and telephone number.

Despite the increased use and acceptance of payroll cards, the extent to which employers may rely solely on electronic wage payment methods remains unclear in many states. For example, it is not clear whether employers may offer payroll cards as an alternative to direct deposit in Montana, New Mexico and Vermont. Moreover, in states where direct deposit and/or payroll cards must be voluntary, it is unclear whether giving employees the choice between these two methods of wage payment satisfies the voluntariness requirement or whether traditional paper paychecks still must be made available.

Some vendors have begun to offer convenience checks drawn on the debit card account in an attempt to satisfy the paycheck requirement while delivering wages electronically. Convenience checks allow employees to draw upon funds in their debit card account by writing themselves a check for the full amount of their pay. It is yet to be seen whether the states will accept convenience checks as an alternative to traditional paper paychecks and, if so, under what conditions.

Conclusion

It is likely that the use and acceptance of payroll cards will continue to increase and that electronic methods of wage payment will ultimately replace paper paychecks. Until that time, however, employers should carefully review the wage payment statutes and regulations in the states where they operate to ensure compliance and thereby avoid potentially severe penalties.

Editor's Note:

In Canada, payment of wages is governed by the Employment Standards legislation in each of the provinces and territories. While legislation in Prince Edward Island and the federal jurisdiction is silent on the method of payment of wages, all of the remaining provinces and territories permit wages to paid by direct deposit to an employee's bank account. However, direct deposit does not address certain situations: i.e., cases where an employee does not have a bank account and the requirement that the employee receive a pay statement.

Most jurisdictions specify that the statement of wages must be in writing. In today's electronic world, some employers have been wondering if the statement of wages can be provided electronically, say via e-mail. The terms of the legislation create the employer's legal obligations. Most legislation in Canada still reflects the paper only world and has not yet been amended to include electronic forms of document delivery. Until legislation is amended, the statement of wages should be provided in writing on paper. Should an employer wish to get permission to deliver the statement of wages via e-mail, the employer should contact the provincial employment standards office and request a written authorization to do this. British Columbia, Ontario and the Northwest Territories are the only jurisdictions to specifically permit electronic delivery of the statement of wages in their employment standards legislation.

With governments focusing on paper burden/red tape reductions and Canadians being one of the world's top users of debit cards, electronic pay statements and payroll cards could easily be part of our future too!

Hot News Items

2009 CPP/QPP Contributions

In November, the Canada Revenue Agency confirmed that the 2009 CPP/QPP maximum pensionable earnings figure will be $46,300 – up from $44,900 in 2008. The new ceiling was calculated according to a CPP legislated formula that takes into account the growth in average weekly wages and salaries in Canada.

Revenu Quebec has also announced that the 2009 figures will be the same under the Quebec Pension Plan (QPP).

Contributors who earn more than $46,300 in 2009 are not required or permitted to make additional contributions to the CPP/QPP.

The basic exemption amount for 2009 remains $3,500. Therefore, maximum contributory earnings are $42,800. Individuals who earn less than that amount do not need to contribute to the CPP/QPP.

The employee and employer contribution rates for 2009 will remain unchanged at 4.95%, and the self-employed contribution rate will remain unchanged at 9.9%.

The maximum employer and employee contribution to the plan for 2009 will be $2,118.60 and the maximum self-employed contribution will be $4,237.20. The maximums in 2008 were $2,049.30 and $4,098.60.

The new CPP/QPP rates have been incorporated into PaySource in the "CPP/QPP" tab division at ¶30,355 *et seq.*

2009 WCB Maximum Assessable Earnings

As of this update, we have received confirmation of all of the 2009 WCB maximum assessable earnings figures except the Yukon.

- Alberta – $72,600;
- British Columbia – $68,500;
- Manitoba – $83,000;
- New Brunswick – $55,400;
- Nova Scotia – $49,400;
- Newfoundland/Labrador – $50,379;
- Ontario – $74,600;
- P.E.I. – $47,500;
- Quebec – $62,000;
- Saskatchewan – $55,000;
- N.W.T./Nunavut – $72,100.

The new maximum assessable earnings figures have been incorporated into PaySource in the "Workers' Compensation" tab division at ¶80,005.

Need To Know

2009 EI Premium Rates Confirmed

In the October issue of *PaySource*, No. 160, we reported on the preliminary EI figures as per the Chief Actuaries Report. With this issue, we are confirming that the 2009 EI rates set by the EI Commission are the same as the preliminary figures.

The following are the 2009 EI rates:

- 1.73% (the same as for 2008) for residents of provinces without a provincial plan (all of Canada except Quebec); and
- 1.38% (compared to 1.39% for 2008) for residents of provinces with a provincial plan (Quebec) (calculated as 1.73% minus the premium reduction of 0.35% (compared to 0.34% for 2008) granted for provincial plans).

2009 Maximum Insurable Earnings

In accordance with the indexation formula of section 4 of the Act, which is based on the average weekly earnings, the annual maximum insurable earnings for **2009 shall therefore be set at $42,300** compared to $41,100 for 2008.

The new EI rates have been incorporated into PaySource in the "Employment Insurance " tab division at ¶35,400 *et seq.*

Quebec Reservists Leave Now Law

The amendments are contained in *An Act to amend the Act respecting labour standards principally with regard to reservists*. The Bill, which was previously summarized in the July issue of *PaySource*, No. 157 and the October issue of *PaySource*, No. 160 received Royal Assent October 29, 2008 and is now law.

Reservists Leave

Employees who are also reservists of the Canadian Forces have the right to be absent from work, without pay, for one of the following reasons:

- if the employee is credited with 12 months of uninterrupted service, to take part in a Canadian Forces operation outside Canada, including preparation, training, rest, and transportation from the reservist's place of residence and back, for a maximum period of 18 months;
- to take part in a Canadian Forces operation in Canada whose purpose is to provide assistance in the case of a major disaster within the meaning of the *Civil Protection Act*, to aid the civil power, on request of the Attorney General of Quebec under the *National Defence Act*, or to intervene in any other emergency situation designated by the government;
- to take part in annual training for the period prescribed by regulation or, if no such period is prescribed, for a period of not more than 15 days; or
- to take part in any other Canadian Forces operation as prescribed by regulation.

To take advantage of the leave, the employee would be required, where possible, to give the employer at least four weeks' written notice of the reason for the leave, the date it is to begin, and its duration. The employee would be able to return to work before the expected date after giving the employer at least three weeks' written notice. On request, the employee would be required to provide the

employer with any document justifying the employee's absence. An employee who is absent on reservist leave for a period greater than 12 weeks would not be permitted to be absent again on reservist leave before the expiry of a period of 12 months from the date of his or her return to work. The annual vacation entitlement provisions of the Act would be amended so that, if an employee is absent on reservist leave at the end of the 12 months following the end of a reference year, the employer may either defer the employee's annual leave entitlement or pay the indemnity for that leave.

An employee would not be entitled to take reservist leave if his or her absence would endanger the life, health, or security of other employees or cause destruction or serious deterioration of certain property, or in a case of superior force, or if the absence is inconsistent with the employee's professional code of ethics.

Miscellaneous Amendments

Bill 98 also makes several other amendments to the Act, including:

- permitting persons to be considered as spouses for the purposes of the Act even if they temporarily cease to cohabit or if one of them is required to live permanently in another place for health reasons or because of imprisonment; and
- stipulating that an employee who intends to take paternity leave must give the employer three weeks' written notice stating the expected dates of the leave and of the return to work.

The new Quebec Reservists Leave has been incorporated into the Employment Standards section of PaySource at ¶6525 and ¶6865.

Recent Cases and Rulings

Employee's dismissal for misconduct disentitled him to notice

• • • **Manitoba** • • • Mazur was involved in a number of incidents while working for the employer. He had been warned by the store manager that badmouthing other staff and members of management was unacceptable. Mazur was also suspended for five days for assaulting or attacking a former employee. He was told that he would be immediately terminated if he was engaged in any further such altercations, and was required to attend anger management counselling. In the years following this warning, a number of other incidents occurred, including Mazur's allegedly calling the head of Human Resources names and being discourteous to a customer. Then, on January 16, 2008, Mazur aggressively shouted at the bakery manager, at which point he was suspended and asked to leave. Instead of leaving he continued to confront the bakery manager, and uttered a threat to two other managers. The employer terminated Mazur, finding that he was guilty of wilful misconduct, disobedience or wilful neglect of duty, and had acted in a violent manner in the workplace. Mazur brought a claim alleging he was entitled to wages in lieu of notice as set out in the *Employment Standards Code*, which was challenged by the employer.

The appeal was allowed, and the employer was entitled to dismiss Mazur without notice. According to subsection 62(1) of the Code, an employer is not required to provide notice to an employee that engages in wilful misconduct, disobedience or wilful neglect of duty, or is violent in the workplace. In order to rely on this exception, the employer is required to prove the employee acted wilfully. A single incident of wilful misconduct or insubordination can be sufficient to oust the requirement to give notice. Applying these principles to the facts of the case, the Manitoba Labour Board concluded that, while the prior incidents could not be used to justify termination without notice, they could be used to support the claim that the employee's actions were wilful and deliberate, and to demonstrate that he had been warned and cautioned about such behaviour in the past. In this situation, Mazur was disobedient and insubordinate for refusing to follow the directions of his manager, was insubordinate for not leaving the premises once suspended, and had threatened one of the managers. Accordingly, the employer was entitled to dismiss him without notice.

FCL Enterprises Co-Operative, trading as The Marketplace in North Kildonan v. Mazur, (Man. L.B.), 2008 CLLC ¶210-041.

Supreme Court evaluates damages for breach of employee duties and unfair competition

• • • **British Columbia** • • • RBC Dominion Securities ("RBC") and Merrill Lynch were securities and investment dealers with branches in Cranbrook, British Columbia. On November 20, 2000, most of the investment advisors and their assistants in the RBC Cranbrook branch left RBC to work for Merrill Lynch, a move that was orchestrated by the RBC branch manager. Prior to leaving, the sales staff copied client records, and used those records to establish accounts for Merrill Lynch. RBC brought an action against Merrill Lynch, the regional manager, the branch manager,

and some individual staff. The trial judge awarded damages for failure to give notice, and punitive damages for taking the confidential client records. In addition, the trial judge found that the investment advisors had engaged in unfair competition when they left RBC, and the branch manager was found to have breached a contractual duty of good faith owed to his employer by facilitating the departure of the other investment advisors to Merrill Lynch. However, the trial judge found that none of the former employees of RBC stood in a fiduciary relationship with the company. The Court of Appeal reversed some of these damages (see 2007 CLLC ¶210-006). It upheld the trial judge's award of damages for lack of notice by the employees, and the punitive damages awards, but it set aside the awards of damages against the individual employees. RBC appealed.

The appeal was allowed, in part. The Supreme Court upheld the award by the trial judge of damages for loss of profits suffered by RBC as a result of the branch manager's failure to perform his duties in good faith, specifically his organization of the departure of almost all of its investment advisors. Damages arising from the breach of a contract should arise naturally as the probable result of a breach of the contract. The appropriate question in this case was whether, had the parties directed their minds to the possibility that the branch manager might organize the departure of almost all of the investment advisors, they would have contemplated a loss of profits giving rise to damages. The trial judge used the correct legal test in finding the branch manager liable for damages. But the Supreme Court did not uphold the damages for unfair competition awarded against the investment advisors for competing against RBC during their notice period. Once the investment advisors left RBC, they were no longer under a duty not to compete with RBC. Their post-employment duties were limited to the duty not to misuse confidential information, and any fiduciary or restrictive covenant duties, which were not at issue. Accordingly, the order of the trial judge was reinstated, except for the unfair competition awards against the investment advisors arising out of their conduct during the notice period.

A dissent would have dismissed the appeal. According to the dissent, employees are generally free to leave their employment and compete with their former employer as soon as their employment ends. In this case, the branch manager was not asked to sign a non-competition clause, and there was no reason for the courts to impose restrictions on post-employment competition retroactively. The branch manager was not in a fiduciary relationship with his employer, and his implied duty of good faith should not have been extended to include an enforceable obligation to protect his employer's interests by actively attempting to retain investment advisors for the employer. This would create "quasi-fiduciary" employees. In addition, there was no violation of the implied duty of good faith for an employee to discuss plans for leaving with fellow employees. Therefore, the branch manager was under no duty of good faith to keep the employees, and the award of damages of five years' presumptive loss was excessive. The investment industry involves relationships between employees and employers that are often short-lived and subject to abrupt change.

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc., Michaud, Delamont, Bellomo, Swift, Evin, Neilson, Kravski, Clarke, Duffy, Dodgson, Juozaitis, Van Nest Klein, Daniel, and Hale, (S.C.C.), 2008 CLLC ¶210-042.

Employee had right to access all company e-mails concerning him over a two-year period

• • • **Canada** • • • Johnson was a clerical employee of Bell Canada, and on May 12, 2005, he sent an e-mail to his manager asking for access to "e-mails concerning me in this company . . . from all sources" for the preceding two years. Specifically, Johnson was looking for e-mail messages he believed had been sent by or to other employees, including supervisors, which concerned him but he did not communicate this to Bell. Bell acknowledged that it was required to respond to the access request but advised Johnson that it needed more time. On July 11, as specified by Bell, it provided Johnson with copies of 280 e-mails, although some e-mails were not forwarded until a later date because of concerns about revealing personal information about a third party, or threats to the security of another. To find the e-mails to forward onto Johnson, Bell Canada had looked through e-mails that Johnson's supervisor had access to that involved Johnson. Johnson had already filed a complaint with the Privacy Commissioner, prior to the e-mails being given to him by the employer, claiming that he had not been provided with all of the requested e-mails. The Privacy Commissioner found that Bell should not have extended the time for response without providing a reason and that it failed to inform Johnson of his right to make a complaint to the Privacy Commissioner about the extension. However, the Commissioner found the extension to be reasonable, that Bell had met its obligation under *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), and that the complaint was resolved. Johnson filed an application for review.

The application was dismissed. If an e-mail concerning an individual employee is sent by one employee to another in the course of the employer's business, or the employer receives an e-mail from a third party concerning an employee, which e-mail is used by the employer in its business operations, then the e-mails are personal information accessible by the employee under PIPEDA. The e-mails produced by Bell in this situation qualified as accessible e-mails. At issue was whether personal e-mails sent by employees were collected, used or disclosed by Bell in the operation of a federal work, undertaking or business. E-mail systems back-up e-mails and therefore catch a large number of e-mails that may be for business purposes, or for personal use by employees. But, the information contained in personal e-mails was not being "handled" by Bell, and there was no business purpose for such personal e-mails. Such personal information that an individual collects for personal reasons was exempt from being released by the company. Therefore, personal e-mails were not subject to PIPEDA, and were not required to be disclosed by Bell. In addition, the search conducted by Bell for e-mails containing personal information about Johnson was reasonable. While it is inevitable that some e-mails would be deleted during the time taken to process an access request such as here, an employer cannot be required to preserve or recover all e-mails lost over that period in case they may be relevant.

Johnson v. Bell Canada, (F.C.T.D.), 2008 CLLC ¶210-046.

Amounts issued by WSIB and withheld from taxpayer's salary did not constitute employment income

Following a workplace injury suffered in July 1994, the taxpayer was off work. She returned to work on March 4, 1996. For the period from March 4, 1996 to October 2, 1996 (the "Period"), the taxpayer received compensation from her employer. However, she also received $18,787.30 from the Workplace Safety and Insurance Board during the Period. Her employer withheld this $18,787.30 from salary amounts payable to her, alleging that it was an amount owing by her to the federal Crown. In reassessing the taxpayer for 2004, the Minister included in her income the $18,787.30 on the grounds that it was received by her as salary for purposes of s. 5 of the Act. On her appeal to the Tax Court of Canada, the taxpayer argued, in part, that she had never received the $18,787.30, and that it should therefore not have been included in her income.

The taxpayer's appeal was allowed. The taxpayer was indebted to the federal Crown for the $18,787.30. Therefore, the $18,787.30 was properly withheld from her by her employer under s. 155 of the *Financial Administration Act*, and, in that sense, it was constructively received by her. However, the Crown was precluded under s. 32 of the *Crown Liability and Proceedings Act* from actually collecting the $18,787.30. As a result, withholding the taxpayer's wages to satisfy the $18,787.30 owing by her was not lawful, so that this amount could not be regarded as having been received by her for purposes of s. 5 of the Act.

Sherman, (Tax court of Canada), 2008 DTC 4841.

Taxable Income of Non-Residents

A Canadian college will establish a campus in a foreign country. The CRA was asked whether a non-resident employee of the college will be subject to tax on remuneration paid by a Canadian employer for duties performed outside Canada pursuant to subsection 115(2). Clause 115(2)(e)(i)(B) "excludes remuneration paid by a Canadian employer to a former resident of Canada where the payment is attributable to the duties of an office or employment performed outside Canada and the payment is made in connection with the selling of property, the negotiating of contracts or the rendering of services in the ordinary course of a business carried on by the employer". Therefore, the question was whether the college could be considered to be carrying on a business. The CRA stated that the activities of the college are relevant to the determination of whether a business is being carried on, and the fact that profit is not the predominant motive will not in and of itself mean that a business is not being carried on. In this case, the CRA looked at the following factors to assist it in determining that the operation of the college campus outside Canada constitutes a business carried on by the college:

(a) The college's articles of incorporation permit it to raise revenue through special projects and the new campus outside Canada constitutes a special project.

(b) The special project constitutes "an undertaking of any kind whatever" within the meaning of "business" in subsection 248(1) of the Act.

(c) This campus will be an activity that is carried out on a regular and continuous basis over a period of time.

(d) The obligations of the college are consistent with those of a college that would be carrying on such an activity for profit.

(e) The operation of the campus will in fact generate profits for the college.

The CRA concluded that the operation of the college campus outside of Canada would constitute a business carried on by the college and that as such "any employees of the college who are former residents of Canada and who render services in the ordinary course of the operation of the college's campus would be persons described in clause 115(2)(e)(i)(B) of the Act".

Technical Interpretation, Financial Sector and Exempt Entities Division, May 15, 2008, Document No. 2008-0274421I7.

Private Health Services Plan (PHSP)

The taxpayer and his wife are the president and vice-president of a consulting company as well as its sole shareholders and only employees. The CRA was asked whether the taxpayer could administer the company's own PHSP and be entitled to a deduction for contributions made to the PHSP in determining the company's income. The benefits received by employees in respect of the employer contributions to a PHSP are not subject to tax by virtue of subparagraph 6(1)(*a*)(i) of the Act.

A PHSP must be in the nature of insurance. According to paragraph 6 of IT-339R2, it satisfies this requirement when it represents an undertaking by one person to indemnify another person for an agreed consideration from a loss or liability in respect of an event, the happening of which is uncertain.

In a "cost plus" plan, the employer contracts with an administrator to indemnify the employees' claims on defined risks under the plan, but the employer reimburses the administrator for the cost of claims. As such, it is the employer, not the administrator, who insures the employees. The CRA has stated that such a cost plus plan could contain the basic elements of insurance and qualify as a PHSP. In order to qualify as a PHSP, the plan must involve a reasonable amount of risk on the part of the insurer. While a cap on benefits reduces the risk, it is the CRA's view that an otherwise qualifying plan would not automatically be disqualified as a PHSP solely for this reason. If the plan or arrangement provides that it can be terminated at any time by the employer, without notice at his sole discretion, there is some doubt as to whether the requirement to undertake risk would be met.

Because the employees in this case are shareholders, any benefits they derive under the plan would not be exempt under subparagraph 6(1)(*a*)(i) and would instead be taxable under subsection 15(1), unless such shareholder is actively engaged as an employee of the company and the benefits received under the PHSP are reasonable in the circumstances; in which case, the CRA is of the view that such benefits would, in fact, be derived from employment and be exempt under subparagraph 6(1)(*a*)(i).

The CRA is of the view that the medical expenses paid by the PHSP must qualify for the medical expense tax credit under subsection 118.2(2). The definition of PHSP provides that coverage can only be for hospital expenses, medical expenses, or any combination thereof. If a particular plan provides coverage for expenses beyond those described in subsection 118.2(2), the entire plan will not qualify as a PHSP and the rules for "employee benefit plans" could apply.

Technical Interpretation, Income Tax Rulings Directorate, August 8, 2008, Document No. 2008-0277981E5.

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