Date of Hearing: May 2, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Mike Eng, Chair
AB 51 (Yamada) – As Amended: March 31, 2011

SUBJECT: Payroll cards.

SUMMARY: Authorizes employers to pay employee wages by means of payroll cards that meet certain specified conditions. Specifically, this bill:

1) States that nothing in current law prohibits an employer from paying an employee's wages through a payroll card program, provided that all of the following requirements are satisfied:

    a) The employer has obtained the employee's voluntary written consent to receive wages by payroll card, as specified;

    b) The employer has not made participation in the payroll card program a condition of hire or continued employment;

    c) The employer has offered the employee, and the employee has declined, both the option of receiving his or her wages by direct deposit to a depository account of the employee's choosing and the option of receiving payment by paper check;

    d) The contract the employer has entered into with the issuer requires that the issuer provide the employee, at no cost to the employee, all of the following:

        i) The right to make at least two withdrawals per pay period from an automated teller machine (ATM) on the day of and after each deposit of wages, as specified.

        ii) At least one method to withdraw the entire amount of wages for each pay period.

        iii) A specified periodic transaction statement.

        iv) A transaction history for the preceding 12-month period.

        v) Electronic balance notifications for each day or after each transaction, at the request of the employee.

        vi) An annual notice by postal mail informing the employee of his or her right to request periodic statements, 12-month transaction histories, and electronic balance notifications.

    e) The issuer or employer does not charge the employee specified fees or charges for certain activities;

f) The funds in the payroll card account do not expire, as specified;

g) The payroll card account is not linked to any form of credit, including a loan against future wages or a cash advance on future wages;

h) The employer honors a request by the employee to change the method of receiving wages from the payroll card account to another method that is allowed by law, within two pay periods from the time of the request; and,

i) The payroll card account is insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration on a pass-through basis to the employee.

2) Prohibits an employer or issuer from engaging in unfair, deceptive, or abusive practices in connection with offering or administering a payroll card program.

3) Specifies that provisions of existing law related to the provision by the employer of an accurate itemized wage statement apply to payment by payroll cards.

4) Defines "issuer" as a payroll card issuer, and includes a person acting as an agent of an issuer, directly, or indirectly.

5) Makes other related and conforming changes.

FISCAL EFFECT: Unknown

COMMENTS:

Need for the bill.

According to information supplied by the author's office:

> *Payroll cards, a card issued by an employer in lieu of wages that functions similar to an ATM or debit card, have grown in use among employers seeking an alternative to paper checks when paying employees that cannot or do not want to receive their wages through direct deposit. This method of payment is less expensive than issuing paper checks and simpler for the employer to deliver wages. In 2005 it was estimated that the cost to employers of issuing a paper check was between $1 and $2 while electronic funds transfers cost employers only about 20 cents per employee.*
>
> *Despite the advantages payroll cards provide to employers, employees can often encounter problems receiving their full wages when using these cards. Fees on services associated with the card can quickly add up to cost the employee a substantial portion of their earnings. Fees on ATM withdrawals and point of sale transactions can be up to two dollars per transaction, balance inquiries can be up to and over a dollar depending on the method of inquiry, and contacting a live customer service representative can run up to three dollars per call. In addition, the employees that most commonly receive payroll*

cards are those that are unbanked or underbanked. A recent survey by the Federal Deposit Insurance Corporation found that 71% of unbanked households in the United States earned less than $30,000 per year. These people are the least able to afford the fees that banks assess on normal checking accounts let alone the fees associated with a payroll card.

Current California Law is silent on the use of payroll cards. In 2008 the counsel for the Department of Industrial Relations' Division of Labor Standards Enforcement issued two letters at the request of payroll card companies stating that it interpreted Section 213 of the Labor Code as authorizing payroll cards since they were based off an account that wages were deposited directly into. These two letters have been the basis for payroll card use in California today. This authorization is questionable for a number of reasons. Section 213 also clearly states the financial institution used for direct deposit of wages must be of the employee's choice. It is unclear the level of choice that is being afforded an employee without a current bank when he or she is offered a payroll card or direct deposit as the only options of payment. As a result of this lack of clarity, it is uncertain what protections, if any, exist for employees receiving their wages by payroll card; what standards, if any, exist for the use of a payroll card program for an employer; or if the payroll card method is a legal method for paying employee wages in California. This uncertainty has resulted in employees seeking protection from exorbitant fees to seek remedy in court. Disputes over payroll cards and their use often only see resolution through civil suits. This makes restitution for aggrieved employees and defense for employers against spurious claims, a costly recourse for both parties.

AB 51 solves these problems by establishing clear guidelines for employers that also protect employees from excessive fees. This bill would also clarify that the payroll card method for the payment of employee wages is legal in California.

<u>Background on Payroll Debit Cards</u>

Payroll cards or "pay cards" (also referred to as "stored-value cards") were introduced in the last decade, but have seen an increase in recent years as companies such as Visa and MasterCard began offering their own versions of the service.

A 2005 analysis prepared by the California Research Bureau (*Pay Cards as Payroll Option*: Raymond Hora) provides the following summary of the history of payroll debit cards:

Stored value cards were introduced in the early 1970s with "closed loop systems" on college campuses. Students used these cards for meals, bookstore purchases and other campus-related expenses. In a closed system (close-loop), the card can only be used for restricted purposes. More recently, there are gift certificates and gift cards that can only be used at the sponsoring merchants' locations. Other examples include mass transit cards and pre-paid phone cards.

"Open loop systems," another category of stored value card, were introduced in the mid-1990s in Manhattan, New York, when Visa Cash, Mondex, and MasterCard branded

cards were introduced into the market. Open system (open-loop) cards are widely used beyond the issuer's location through a universal network for PIN-based or signature-based transactions. Open loop systems were further developed and used during the 1996 Olympic games in Atlanta, by participants using a stored value card with the different merchants. According to industry estimates, more than 2,000 stored value programs are available, with roughly seven million Visa- or MasterCard- branded stored value cards in the marketplace today.

Pay Cards, also known as Payroll Cards, use open loop systems. This gives the cardholder the ability to purchase items wherever merchants participate in the brand of card, whether it is Visa or MasterCard. Once a purchase has been made, the funds stored within the card are automatically deducted. The cards may also be used at ATMs to withdraw cash or get cash back from retailers.

Pay Cards are being marketed by third party vendors and financial institutions to employers as a means of reducing the cost of processing paper payroll checks. In general, an employer establishes an account with a selected program and the program issues the Pay Cards, although some Pay Card companies have business partners that actually issue the physical card.

In order to establish an account with a Pay Card program, an employer pays an initial fee. The continuing monthly costs of Pay Cards are largely dependent on the volume of employees using the cards and the fees imposed by the program and bank. The employer deposits funds into a bank account that is managed by the Pay Card company, which issues individual Pay Cards credited with the proper payroll amount for each employee. Each cardholder is issued a Personal Identification Number (PIN) to use with the card. An employee has the choice to withdraw the funds all at once as cash or to use the card as a debit card, without needing to establish a personal banking account.

Depending on the Pay Card program's cardholder fee schedules, the employee may or may not get charged a monthly fee, ATM withdrawal fee, and other fee. Pay Cards may be used at an ATM to withdraw cash or to get cash-back from participating retail stores. The purchasing power of the cardholder can extend to online payments, bill payments, and any other financial transaction. For every processed pay period, the card is either recharged physically at a designated station or electronically. A payroll program can also issue disposable cards loaded with a fixed sum instead of reloadable cards. Some programs offer the option of unnamed cards to protect the identity of the cardholder.

Depending on the features of the Pay Card program, the cardholder has access to account balance and other transaction activity via the Internet or through a 1-800 number, and can transfer funds between two cards. Pay Cards generally are used wherever Visa or MasterCard is accepted (depending on the card issuer and the brand of card). These cards may be used internationally to withdraw funds or make payments if the merchant accepts the branded card. In the event that the card is lost or stolen, cardholders are usually issued a replacement card in five to ten business days.

Discussion.

This bill is intended to provide a statutory framework for the offering and use of payroll cards, while implementing protections for employees who sign-up to use such cards. While payroll cards are being offered by some employers in California, state law is vague at best. The Labor Code doesn't specifically list payroll cards as a legally authorized payment method for employees. However, in 2008 the Division of Labor Standards Enforcement (DLSE) issued an opinion letter in response to an inquiry from two payroll companies concerning whether the use of "payroll debit cards" and "paycards" complies with California law.

DLSE stated that the payroll cards at issue in that case involved both the direct deposit of wages and a means of accessing those wages using an electronic card. Accordingly, they stated that the program must satisfy the requirements set for in Labor Code section 213(d) for direct deposit, including that the employee participation be voluntary. Many employers have issued payroll cards using the DLSE letter as interpretative authorization to do so. Committee staff recommends reading the April 13, 2011 Assembly Labor Committee analysis for a more detailed discussion of California Labor law relating to payment of wages and the various interpretations thereof.

AB 51 fundamentally contains three objectives. First, it clarifies the ability to use payroll cards for the payment of wages under specific circumstances and contractual obligations. Second, it specifies the obligations and disclosures the employer owes to the employee prior to and during the use of a payroll card. Thirdly, it places restrictions and obligations upon the issuer and employer once the card is issued and used. In the process of considering this bill the committee should be aware of the following issues:

1) The bill provides that the "issuer" or employer may not charge the employee various fees for use of the payroll card. The issuer in this case could be a national bank. In the case of a national bank that issues a payroll card, the restriction on fees raises a preemption of state law issue. Typically, state actions that interfere with the activities of national banks have been preempted by the courts and the federal regulator of national banks, the Office of Comptroller of Currency (OCC). Last year, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provided somewhat more clarity on the boundaries of preemption on consumer protection laws by giving states more authority to enact and enforce state consumer protection laws that are consistent with Dodd-Frank and rules promulgated by the Consumer Financial Protection Bureau (CFPB). The limitations on preemption in Dodd-Frank provide that state laws are preempted under three circumstances:

    a) The state law prevents or significantly interferes with the national bank's exercise of its powers in accordance with the preemption standards set in *Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996).*

    b) Application of the law would have a discriminatory effect on national banks.

c) The state law is preempted by another federal law.

The latter preemption standard is most important for the discussion of AB 51. Under 12 C.F.R. § 7.4002 national banks "may charge its customers non-interest charges and fees." Additionally, § 7.4002(b)(2) provides that "establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." OCC interpretative letters and a number of court cases have opined that state laws that restrict the fee charges of a national bank are preempted. A specific example, is contained within the *Bank of America v. the City and County of San Francisco* (N.D. Cal. June 30, 2000) case which concerned local ordinances which limited ATM fees. In the court's decision their interpretation is relevant here concerning the power of national banks to levy fees:

> *We hold that the National Bank Act and OCC regulations together preempt conflicting state limitations on the authority of national banks to collect fees for provision of deposit and lending-related electronic services…*

Committee staff is not making a final determination that the provision of AB 51 would be preempted as that is an issue that will be left up to litigation if this bill were to pass. Instead, the preemption discussion is intended to highlight potential long-term implementation challenges if this bill goes forward.

2) The issuer or employer may not charge a Point of Sale (POS) transaction. The intention in this case may be to prevent transaction fees imposed by the issuer every time the employee uses the card. However, it is somewhat overly broad in that POS fees charged by retailers could be interpreted as the responsibility of the issuer and/or employer.

3) A fee is allowed after the first two ATM withdrawals, yet in a different section, no fees may be charged for in-network withdrawals, or fees not identified in the contract. These provisions appear to be in conflict as one part of the bill seems to prohibit fees allowable under other parts of the bill.

4) Opponents have raised issue regarding the numerous prohibitions and restrictions required in order to use a payroll card and that those requirements make the payroll card option unworkable as an alternative to a paper check. Additionally, if a fee were to inadvertently occur, the bill does not provide a mechanism for the employer or issuer to refund the fee to avoid a violation.

5) Imprecise definition of "issuer." Issuer under this bill could be the payroll card issuer, or person acting as the agent of an issuer. The intention is to include both financial institutions that offer payroll cards and those entities that are not financial institutions. In the bill the issuer or employer must ensure that the payroll card account is insured by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration (NCUA). A non-bank issuer of payroll cards would not have access to FDIC or NCUA insurance coverage. Staff believes the intention in the bill is to clarify that a non-bank issuer

must contract with an institution that has FDIC or NCUA coverage in order to offer the payroll account. However, because the definition of "issuer" is somewhat imprecise, these provisions could be confusing.

6) How will this bill interact with Regulation E, which implements the Electronic Fund Transfer Act? On July 1, 2007 the Federal Reserve release the final rule concerning the inclusion of payroll cards under Regulation E (Regulation E; Docket No. R-1247)

> *Under the final rule, payroll card accounts specifically are included in the definition of "account" for purposes of Regulation E. A "payroll card account" is defined as an account directly or indirectly established through an employer to which transfers of the consumer's wages or other compensation are made on a recurring basis. Section 205.18 of the final rule grants financial institutions flexibility in providing certain account information to payroll card users. In particular, a financial institution need not provide periodic statements under § 205.9 if the institution: (1) makes available balance information to the consumer through a readily available telephone line; (2) makes available to the consumer an electronic history, such as through an Internet web site, of the consumer's account transactions covering a period of at least 60 days preceding the date the consumer electronically accesses the account; and (3) upon the consumer's oral or written request, promptly provides a written history of the consumer's account transactions covering a period of at least 60 days prior to the request. The history of account transactions provided electronically or upon request must set forth the same type of information required on periodic statements under Regulation E, including information about any fees for EFTs imposed during the 60-day period.*

7) Would a more appropriate solution be to outline the minimum standards for payroll card contracts between employers and issuers?

<u>Amendments.</u>

In an attempt to resolve the aforementioned issues, the proposed amendments below, change the requirements in the bill and instead establish the minimum standards for the payroll card contract between the employer and employee. These amendments provide that the payroll card offered to the employee, by the employer must meet the specific standards set out in the bill.

SECTION 1. *Section 213.5 is added to the Labor Code, to read:*

213.5. *(a) For purposes of this section, the following definitions apply:*

(1) "Employer" means a person, partnership firm, corporation, limited liability company, association, or other entity that employs a person or persons to perform services for a wage or salary, and includes a person, partnership firm, corporation, limited liability company, association, or other entity acting as an agent of an employer, directly or indirectly.

*(2) "Issuer" means ~~a~~ **<u>the</u>** payroll card issuer, and includes a person **<u>or entity</u>** acting as an agent of an issuer, directly or indirectly.*

(3) "Payroll card" means an access mechanism, including a prepaid card, code, or other device, issued to an employee by an employer, or by another entity by arrangement with the employer, through which the employer provides the employee access to his or her wages.

(4) "Payroll card account" means an account that holds funds drawn upon by a payroll card.

(5) "Payroll card contract" means a contract entered into by an employer with an issuer to provide employees with payroll cards as a means to pay wages.

(b) Nothing in Section 212 prohibits an employer from paying an employee's wages through a payroll card program, provided that all of the following requirements are satisfied:

(1) The employer has obtained the employee's written consent to receive wages by payroll card. That consent must be voluntary and not given as a result of intimidation, coercion, or fear of discharge or reprisal for refusal to participate in the payroll card program. Prior to obtaining the employee's consent, the employer shall provide the employee, in the language the employer normally uses to communicate employment-related information to the employee, all of the following information:

(A) A description, stated in plain language, of the employee's options for receiving wages.

(B) The terms and conditions of the payroll card account, including a clear, conspicuous, and complete itemized list, in a form the employee may retain for his or her records, of any fees that may be deducted from the employee's payroll card account by the issuer. The list shall state the dollar amount of each fee.

(C) A list of the services available to the employee pursuant to paragraph (4).

~~(D) All of the information required by subparagraphs (A), (B), and (C), made available in a clear and conspicuous manner on the employer's Internet Web site or on an Internet Web site maintained by the issuer with a clear link from the employer's Internet Web site.~~

(2) The employer has not made participation in the payroll card program a condition of hire or continued employment.

(3) The employer has offered the employee, and the employee has declined, both the option of receiving his or her wages by direct deposit to a depository account of the employee's choosing and the option of receiving payment by paper check.

(4) ~~The contract the employer has entered into with the issuer requires that the issuer provide the employee, at no cost to the employee, all of the following:~~ ***An employer shall not provide wages by payroll card unless the payroll card contract the employer enters into provides all of the following at no cost to the employee:***

(A) The right to make at least two withdrawals per pay period from an automated teller machine (ATM) on the day of and after each deposit of wages. ~~Withdrawals may be limited to ATMs in a~~

~~designated network, if the network provides reasonably convenient proximity and access in relation to the employee's place of employment or place of residence.~~

(B) At least one method to withdraw the entire amount of wages for each pay period.

(C) A periodic statement at least once each month, or at least once every three months if there is a balance on the payroll card but no activity on the payroll card account. The employee may choose to receive electronic or paper statements. Each statement shall include all transactions during the statement period, including deposits, withdrawals, fees charged, and other transactions affecting the payroll card account. The employee may choose to decline to receive statements.

(D) A transaction history for the 12-month period preceding the request, at the request of the employee.

(E) Electronic balance notifications for each day or after each transaction, at the request of the employee.

(F) An annual notice by postal mail informing the employee of his or her right to request periodic statements, 12-month transaction histories, and electronic balance notifications.

(5) ~~The issuer or employer does not charge the employee any of the following:~~ ***the payroll card contract does not allow for the following fees to be charged to an employee by any parties to the contact:***

(A) An application, initiation, loading, participation, or other fee to receive wages or to obtain the payroll card.

(B) A fee for a point-of-sale transaction, ***unless the fee is initiated by a person, firm, partnership, association, or corporation that accepts credit or debit cards for the transaction of business and the employee has originated the transaction.***

(__) A fee for using a method offered by the employer to withdraw the entire amount of wages for each pay period.

(C) A fee to withdraw funds from a teller or ATM within the network of the financial institution providing the payroll card account.

(D) An overdraft, shortage, or low-balance fee.

(E) A fee for a declined transaction.

(F) A fee for account inactivity.

(G) A fee for the first three telephone calls to a live customer service representative per pay period.

(H) A fee to access balance or other account information online, by an interactive voice response system, or by any other automated system offered in conjunction with the payroll card, or at an ATM in the network of the issuer.

(I) A fee for a written statement or a transaction history.

(J) A fee to close the payroll card account or issue payment of the remaining balance by check or other means.

(K) A fee to provide at least one replacement card each year.

(L) A fee not expressly identified by type and amount in the contract between the employer and the issuer.

(6) The funds in the payroll card account do not expire. The payroll card account may be closed for inactivity, with reasonable notice to the employee, provided that the remaining funds in the payroll card account are refunded to the employee at no cost to the employee. If the payroll card has an expiration date, the issuer shall provide a new replacement card to the employee at least 15 days before the expiration date at no charge to the employee.

(7) The payroll card account is not linked to any form of credit, including a loan against future wages or a cash advance on future wages. This paragraph does not prohibit an issuer from honoring an inadvertent overdraft transaction at no additional charge to the employee.

(8) The employer honors a request by the employee to change the method of receiving wages from the payroll card account to another method that is allowed by law, within two pay periods from the time of the request.

(9) The payroll card account is insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration on a pass-through basis to the employee.

~~*(c) An employer or issuer shall not engage in unfair, deceptive, or abusive practices in connection with offering or administering a payroll card program.*~~

(d) Any wages paid using a payroll card program that does not meet the requirements of this section are considered unpaid wages for purposes of Section 225.5.

(e) Nothing in this section shall relieve the employer of his or her obligations under subdivision (a) of Section 226.

Previous Legislation.

AB 822 (Benoit) of 2005 would have allowed an employer to deposit employee wages on a payroll card. Held in Assembly Labor Committee.

AB 1591 (Yamada) of 2010 would have prohibited an employer from requiring an employee to receive his or her wages by payroll card unless the employee voluntarily agreed in writing to do so and the employer offered the employee an alternative lawful method to receive his or her wages. AB 1591 was set, but not heard in Assembly Labor Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation – **Sponsor**

AFSCME
CA Conference Board of the Amalgamated Transit Union
CA Conference of Machinists
Consumers Union
Engineers and Scientists of California
International Longshore and Warehouse Union
Professional and Technical Engineers, Local 21
UNITE HERE!
United Food and Commercial Workers – Western States Conference
Utility Workers Union of America, Local 132

Opposition

Associated Builders and Contractors of California
California Bankers Association
California Chamber of Commerce
California Farm Bureau Federation
California Grocers Association
California Retailers Association
MasterCard Worldwide
Visa

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