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LABOR CODE SECTION 212: EMPLOYER LIABILITY FOR BANK FEES INCURRED BY EMPLOYEES CASHING PAYCHECKS

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In the past few years, some banks, including Bank of America and Wells Fargo, have started to charge non-customers a fee to cash checks issued by their bank. Although this may seem inconsequential to people who have bank accounts, many people who don't have a bank account incur a fee to cash checks, including their paycheck. When a California employee incurs a fee to cash his or her paycheck, an employer is thereby violating California law.

California Labor Code Section 212 provides that employee paychecks must be "negotiable and payable in cash, on demand, *without discount*, at some established place of business in the state, the name and address of which must appear on the instrument." Cal. Lab. Code § 212(a)(1). An employer who violates Section 212 may be assessed penalties pursuant to Labor Code Section 225.5. The penalty for the first violation is \$100 and the penalty for each subsequent violation is \$200 plus 25% of the amount withheld from the paycheck of each employee who had to pay a fee. Furthermore, Labor Code Section 2966 allows employees to file private civil suits against their employer for violations of Section 212.

Labor Code Section 212 was virtually disregarded until a series of newspaper articles by the San Francisco Chronicle brought the law to the public's attention. There is no case law, DLSE opinion letters or other published literature by the DIR relating to the liability of employers for bank fees under Section 212. Amid a newspaper article's allegations that many employers were violating this Section, a spokesperson for the Department of Industrial Relations stated that although this issue has not come up before, the DIR will review any complaint relating to bank fees incurred for cashing a paycheck and will take appropriate action against the employer.

Though the extent of an employer's liability is presently unclear, it appears that the Department of Industrial Relations is taking an active interest in this law. The DIR has asked state Attorney General Bill Lockyer to issue an opinion clarifying the scope of Section 212. However, due to the current uncertainty surrounding Section 212, the DIR has stated that it will hold all complaints relating to this issue until they receive clarification from the Attorney General.

The California Legislature is also taking an active interest in this issue. The State Senate Committee on Banking, Commerce and International Trade recently held hearings on the check cashing fees charged to non-customers. In response to the publicity these bank fees have been receiving, State Senator Dean Florez introduced a bill that would prohibit banks from charging the fee to cash a paycheck.

The proposed legislation is being met with fierce opposition by banking institutions who argue that such a law is preempted by federal banking laws. In fact, Bank of America and Wells Fargo were among several banks who successfully challenged a similar Texas law that prohibited fees to cash paychecks. The Fifth Circuit Court of Appeals ruled that federal law preempted the state law since banks are entitled to charge such fees under the National Bank Act, even if the practice violates state law. *Wells Fargo Bank of Tex. NA v. James*, 321 F.3d 488 (2003). Senator Florez asserts that the proposed legislation stands a better chance in the Ninth Circuit, which is more consumer-friendly than the Fifth Circuit.

Due to the recent publicity of this issue and the uncertainty regarding an employer's potential liability, employers are advised to make certain that all of their employees have a way to cash their paychecks without incurring fees. The first step is to find out whether or not your bank charges a fee to non-customers. If your bank does charge, below are some suggestions to bring your company into compliance with Section 212:

1. **Talk to your bank.** If your bank charges a fee, ask the bank to waive the fee for employees cashing a paycheck. Most requests for waivers are handled on a case-by-case basis. Therefore, if your request is denied, don't give up immediately - try talking to someone else.

**If the bank will only waive the fee at one particular branch, it may be advisable to place the branch address on the paycheck. Even though Section 212(c) states that the bank's address does not have to appear on the paycheck, the employee should be given notification of the location where he or she may cash the check without being charged a fee.

2. **Set up accounts for employees who are charged a fee.** If your bank refuses to waive the check cashing fee, perhaps the bank will agree to set up bank accounts for any employee who does not have a bank account. But be careful of this option - some banks charge account holders monthly fees which arguably could still violate Section 212 if the

employee *has* to open an account to cash the paycheck without being charged. Since many banks waive account fees for direct deposit, the employer could set up direct deposit for the employee's paycheck. There may be another potential problem if the bank requires account holders to have social security numbers and the employee does not have one.

3. **Change banks.** Many banks, such as Citibank and Washington Mutual, do not charge a check cashing fee. Although it may be a hassle to change banks, it is less bothersome than defending a DLSE charge or a civil lawsuit. It may also be advisable to ask the new bank for a written agreement stating that they will not charge a fee to cash company paychecks. This way, if the bank decides at a later date to charge a fee, you won't have to change banks again.

4. **Pay The Fee.** Employers can pay the check cashing fee for its employees who incur a fee. This option is problematic. You would have to keep track of the employees who are charged a fee by your bank and you will also have to keep track of reimbursement payments.

5. **Set Up An In-House Check Cashing Service.** Under this option, the employer could inform employees upon hire that although the employer's bank charges a fee for non-customers cashing their paychecks, the company is willing to cash paychecks for employees who are unable to cash their checks without incurring a fee. The downside of this option is that the employer would need to have cash on-hand to cash the employee paychecks. However, the employer could possibly require employees using this service to give the employer advanced notice.

6. **Hire A Third-Party With Locations In California To Cash Paychecks.** Under this option, an employer can hire a third-party company to cash employee paychecks on behalf of the company. An employer can hire a check cashing company or perhaps even negotiate with a store, such as Ralphs or Vons, who provides check cashing services and has numerous locations throughout California.

If you would like additional information about your company's potential liability under Labor Code Section 212, please contact any member of the firm's Employment Practice Group.