New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

June 29, 2010

[redacted]

Re: Request for Opinion
Section 192
Pay by Check
RO-10-0028-Revised

Dear [redacted]:

I have been asked to respond to your letter dated January 25, 2010, to Maurice Maullen in which you request an opinion regarding Section 192 of the Labor Law. Your letter states that some of the contractors that hire your union's members issue paychecks from banks that do not have a nearby branch at which the union-represented employees can cash them. Employees that do not have bank accounts at a nearby bank may be required, in some instances, to drive as much as seventy miles to a branch to cash the check. Your letter asserts that, through this practice, the contractors are trying to force employees into electing to be paid via direct deposit, and asks for an opinion regarding that practice under Section 192 of the Labor Law.

Please be advised that the Department's 1977 guidelines for payment of wages by check, which were attached to your letter, have been superseded by a 1994 amendment to Section 192 of the Labor Law. (L. 1994, ch. 170, §205.) That amendment removed the requirement in Section 192 that wages be paid in cash, thereby permitting employers to pay wages by check without application for approval from the Department of Labor. (Id.) However, while the 1994 amendment to Section 192 relieved employers of the permit requirement for the use of payroll checks, such checks must nevertheless satisfy the provisions of Section 191 which requires the full and timely payment of wages.

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To satisfy these obligations with regard to payment by check, employers must ensure that the check has sufficient funds to draw upon and the check must be considered a negotiable instrument within the meaning of Article 3 of the Uniform Commercial Code. Moreover, the employer must ensure that the employee has the ability to access his or her wages without fees or cost to the employee. Such requirements operate to ensure that the payroll check serves as a cash equivalent for the payment of wages to the employee. If an employer fails to provide payroll checks that are easily negotiable by its employees, the employer may be in violation of these requirements. Employers who draw checks on banks which are not easily accessible or available to their employees have other alternatives to address this issue. Examples of ways in which employers commonly satisfy this requirement include paying employees through checks issued by locally available banks which will cash them for free, or by making arrangements with a local bank to cash the employer's payroll checks without charge to the employee. The mere offering of direct deposit to employees as an option does not satisfy an employer's obligations to ensure that its employees have full and free access to their wages paid by check.

Section 192 also authorizes the direct deposit of wages by an employer to a bank or financial institution provided that the employee provides "advanced written consent" for such a deposit. (Labor Law §192(1).) In interpreting the consent requirement of Section 192(1) of the Labor Law, it is the opinion of this Department that, for consent to be valid, it must be voluntary and not made a condition of employment. Situations in which an employer coerces employees into consenting to direct deposit will not be deemed to be valid under Section 192. While the Department has previously held that a collective bargaining agreement can provide consent to direct deposit on behalf of a union member, the collective bargaining agreement governing your union's members does not do so; rather it merely provides that they may consent, in writing, to have their pay directly deposited by their employer. Accordingly, while it appears that the employer practices described in your letter may render employee consent invalid, thereby violating the requirements of Section 192 of the Labor Law, a definitive determination can only be made after an investigation by the Department's Division of Labor Standards.

If you believe that the employer's practice is in violation of the requirements described in this letter, please do not hesitate to file a complaint with the Department's Division of Labor Standards at its Syracuse District Office:

NYS Department of Labor
Division of Labor Standards-Syracuse District
333 East Washington Street
Room 121
Syracuse, NY 13202
(315) 428-4057

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: Michael Paglialonga

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