



COMMONWEALTH of VIRGINIA

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David Von Moll
State Comptroller
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Dear Ms. Wilson and Mr. Von Moll:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You pose several questions regarding application of the Virginia Workers' Compensation Act¹ (the "Act") and the new 5 percent member contribution toward retirement. Specifically, you ask:

1. When the employing agency issues to the injured worker a payroll check that is net of all standard deductions, including the new 5 percent member contribution toward retirement, is that payroll check a "regular payroll check" for purposes of § 65.2-524? In other words, does "regular" refer to timing of the check, or does it refer to the amount of the check?
2. Does the proposed legislative change to § 65.2-524 solve the problem; *i.e.* does it adequately define "regular payroll payment" to avoid any penalty?
3. Does it make any difference that the deduction for the new retirement contribution begins before or after the injured employee is injured?
4. Is the new 5 percent mandated member contribution toward retirement, or any other employee-elected deduction, such as a health-care premium or flexible reimbursement account deduction, considered an assignment of benefits prohibited by the Act?

¹ VA. CODE ANN. §§ 65.2-100 through 1310 (2007 & Supp. 2011).

5. Is the new 5 percent mandated member contribution toward retirement, or any employee-elected deduction, such as a health-care premium or flexible reimbursement account deduction, a claim of a creditor prohibited by the Act?

Response

It is my opinion that the term “regular payroll check” refers to both the timing of the check and the amount of the check, so that the proposed legislative change to § 65.2-524 adequately defines “regular payroll payment” to avoid any penalty. It is further my opinion that it makes no difference whether the deduction for the new retirement contribution begins before or after the injured employee is injured. Finally, it is my opinion that because neither the new 5 percent mandated member contribution toward retirement or other deductions elected by the employee, including health-care premiums and flexible reimbursement account deductions, constitute an assignment of benefits or a claim of a creditor, they are not prohibited by the Act and may be deducted in appropriate circumstances.

Background

As you relate, the General Assembly in its last session passed, and the Governor signed, legislation requiring state employees covered under the Virginia Retirement System’s Plan 1 to begin paying a 5 percent member contribution toward their retirement on a pre-tax salary reduction basis. The legislation also provided these employees a 5 percent raise. The measure was effective July 1, 2011 and was reflected in employees’ July 16 paychecks. Previous legislation was enacted in 2010 that required new employees, hired after July 1, 2010 and with no existing membership in the Virginia Retirement System, to pay the 5 percent member contribution toward their retirement on a pre-tax salary reduction basis.

You express concern that some of these affected state employees will have suffered workplace injuries compensable under the Act and will be entitled to wage loss benefits under the Act. Of those injured state employees, some will remain on agency payroll, receiving semi-monthly payroll checks, while others will transition off payroll and will receive, on a bi-weekly basis, workers’ compensation indemnity benefits directly from the Department of Human Resource Management, the agency that administers workers’ compensation benefits for claims made by state employees. Thus, your inquiry encompassed two distinct scenarios – an injured employee entitled to workers’ compensation indemnity benefits remaining on agency payroll, and an injured employee entitled to workers’ compensation indemnity benefits who is off payroll, receiving direct payment of benefits. As I understand your request, you are limiting your inquiry to the first scenario: injured employees who remain on an agency’s payroll.²

² You advise that you are not considering applying the new 5 percent member contribution toward retirement to workers’ compensation benefits paid directly to an injured worker by the Department of Human Resource Management in its role as administrator of workers’ compensation benefits for injured state employees. You state this decision is based on your understanding that the workers’ compensation benefit is not “creditable compensation” for purposes of the new 5 percent member contribution. I therefore offer no opinion as to whether the new 5 percent member contribution toward retirement, if applied to workers’ compensation benefits paid directly to an injured employee of the Commonwealth, constitutes an assignment of benefits or claim of a creditor prohibited by § 65.2-531. Nor do I offer any opinion as to whether workers’ compensation benefits are “creditable compensation” for purposes of the new 5 percent member contribution.

You further note that, in an attempt to resolve any potential statutory ambiguity, the Department of Human Resource Management has submitted language to amend the Act, specifically § 65.2-524.

Applicable Law and Discussion

Your first inquiry regards the meaning of “regular” for purposes of § 65.2-524. Section 65.2-524 establishes a penalty for failure to pay workers’ compensation benefits in a timely manner. Specifically, it provides:

If any payment is not paid within two weeks after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percent thereof, unless the Commission finds that any required payment has been made as promptly as practicable and (i) there is good cause outside the control of the employer for the delay or (ii) in the case of a self-insured employer, the employer has issued the required payment to the employee as a part of the next regular payroll after the payment becomes due. No such penalty shall be added, however, to any payment made within two weeks after the expiration of (i) the period in which Commission review may be requested pursuant to § 65.2-705 or (ii) the period in which a notice of appeal may be filed pursuant to § 65.2-706. No penalty shall be assessed against the Commonwealth when the Commonwealth has issued a regular payroll check to the employee in lieu of compensation covering the period of disability.

The last sentence of this Section creates an exception to the penalty provision when the Commonwealth issues a “regular payroll check” to the injured employee in lieu of compensation. You are concerned that deducting the 5 percent member contribution toward retirement might subject the Commonwealth to liability under the penalty provision of § 65.2-524. You therefore ask whether a payroll check that is net of all standard deductions,³ including the new 5 percent member contribution toward retirement constitutes a “regular payroll check” for purposes of § 65.2-524. Put another way, you ask whether “regular” refers to the timing of the check or to the amount of the check.

The Code does not provide a definition for the term “regular” as used in § 65.2-524. In the absence of a statutory definition, words in statutes are to be given their ordinary meaning within the statutory context.⁴ *The American Heritage Dictionary* defines “regular” as “[c]ustomary, usual, or normal.... [c]onforming to set procedure, principle, or discipline....[o]ccurring at fixed intervals; periodic....[c]onstant; not varying.”⁵ *Black’s Law Dictionary* defines “regular” as “[c]onformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary or general.... Made according to rule, duly authorized, formed after uniform type; built or arranged according to established plan, law or principle.”⁶

Applying these definitions to the term “regular payroll check,” I conclude that the adjective “regular” refers to both the timing and the contents of the payroll check. A “regular” payroll check is a

³ You define standard deductions to “include withholding, FICA, health insurance, tax levies, child and spousal support, and any deductions through the Department of Accounts that the employee has requested be made, in writing.”

⁴ See *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); *Loyola Fed. Savings v. Herndon*, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978).

⁵ THE AMERICAN HERITAGE DICTIONARY 1041 (2d c. ed.1982).

⁶ BLACK’S LAW DICTIONARY 1155-56 (5th ed. 1979).

payroll check issued in the normal course of the Commonwealth's issuance of payroll checks, and therefore uniform in occurrence and issued at fixed intervals. A "regular" payroll check is also a payroll check that is like the payroll checks issued to the injured worker prior to his injuries, *i.e.* a payroll check conforming to his pre-injury payroll checks in terms of its components, *e.g.* gross amount, deductions made, etc. Payroll checks issued in the normal course of operations, which include the 5 percent member contribution toward retirement, are still "customary, usual and normal" and conform to set procedures. Such payroll checks are issued according to an established plan, law or principle.

Indeed, had the General Assembly intended to limit the penalty exclusion to a timing issue, it could have chosen words to manifest that intention. Likewise, had the General Assembly intended to limit the penalty exclusion to payroll checks identical to pre-injury payroll checks, it could have so stated. I conclude the General Assembly, in using the term "regular payroll check," intended to encompass both the timing and composition of the checks Commonwealth agencies normally provide their employees.⁷ I therefore further conclude that payroll checks issued to injured workers receiving workers' compensation benefits, that now include the new 5 percent member contribution toward retirement, are "regular payroll checks" for purposes of § 65.2-524.

Relatedly, you next ask whether a proposed legislative change to § 65.2-524 would resolve the problem of a potential ambiguity in the provision, *i.e.*, whether it adequately defines "regular payroll payment" to avoid any penalty.

The proposed amendment is as follows:

If any payment is not paid within two weeks after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percent thereof, unless the Commission finds that any required payment has been made as promptly as practicable and (i) there is good cause outside the control of the employer for the delay or (ii) in the case of a self-insured employer, the employer has issued the required payment to the employee as a part of the next regular payroll after the payment becomes due. No such penalty shall be added, however, to any payment made within two weeks after the expiration of (i) the period in which Commission review may be requested pursuant to § 65.2-705 or (ii) the period in which a notice of appeal may be filed pursuant to § 65.2-706. No penalty shall be assessed against the Commonwealth when the Commonwealth has issued a regular payroll ~~check payment~~ payment to the employee in lieu of compensation covering the period of disability; regular payroll payment issued under this provision by the Commonwealth includes payments issued net of deductions for elected and mandatory benefits and other standard deductions.^[8]

I further understand that there is no concern related to the timing of payroll payments, so that your question is focused on the amount of the payment. As stated above, I believe that the term "regular payroll check" refers both to the timing of the payment and the amount of the payment. If the payments are processed in a uniform course or practice, are of a uniform type with other employees' payroll checks,

⁷ In interpreting statutes, we "assume that the legislature chose, with care, the words it used when it enacted the relevant statute," *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990), for the General Assembly knows how to express its intention, *see* 2010 Op. Va. Att'y Gen. 5, 7 n.5; 178, 179 n.10.

⁸ I understand that the proposed change from "check" to "payment" is unrelated to your questions, but is instead suggested to acknowledge the reality that Commonwealth employees are often paid electronically, without the issuance of actual checks.

and are issued according to the established plan of the Commonwealth for payroll checks for all Commonwealth employees, both as to the timing and the amount, then the penalty provision does not apply. To the extent there is an argument that the General Assembly intended "regular payroll check" to refer only to timing, I believe the proposed amendment addresses that concern by expressly incorporating that element into what constitutes a "regular payroll payment."

Your third question asks if there is any difference in whether the deduction for the new retirement contribution begins before or after the injured employee is injured.

Because the new 5 percent member contribution toward retirement applies to all employees and is instituted uniformly and consistently, it is my opinion that it makes no difference whether the new 5 percent member contribution toward retirement is instituted before or after an employee suffers a work injury.⁹ Otherwise, injured employees would have to be segregated from the main workforce and not contribute to their retirement. The 5 percent member contribution would therefore cease to be uniformly and consistently applied, contrary to the intent of the General Assembly. Again, I render no opinion as to any deductions from workers' compensation benefits paid directly to injured employees.

Your remaining questions pertain to the application of § 65.2-531 to the new 5 percent mandated member contribution toward retirement. Section 65.2-531 provides, in pertinent part:

A. No claim for compensation under this title shall be assignable. All compensation and claims therefor shall be exempt from all claims of creditors, even if the compensation is used for purchase of shares in a credit union, or deposited into an account with a financial institution or other organization accepting deposits and is thereby commingled with other funds. However, benefits paid in compensation or in compromise of a claim for compensation under this title shall be subject to claims for spousal and child support subject to the same exemptions allowed for earnings in § 34-29.

In sum, this provision prohibits both the voluntary assignment of benefits by the injured worker, and the attachment by creditors of the injured worker's benefits.

You ask whether the mandated contribution, when deducted from payroll, or other employee-elected deductions, such as health care premiums and flexible reimbursement account deductions, constitute an impermissible assignment under the Act. I could find no judicial opinions directly addressing the prohibition against assignment provision of this statute; however, by its terms, the prohibition applies only to a "claim for compensation under this title."

Neither payroll payments nor deductions from such payments are claims for compensation under the Virginia Workers' Compensation Act,¹⁰ and thus, fall outside the scope of the prohibition. Further, unlike a classic assignment, where an assignor chooses to assign something to an assignee, the member contribution is mandated by the General Assembly. The employee cannot determine the amount of the contribution, and he cannot determine the recipient. Likewise, he cannot choose whether to participate.

⁹ I am advised that the new 5 percent member contribution toward retirement is deducted from all employees, including after workplace injuries, so long as the employee remains on agency payroll.

¹⁰ Such a claim requires a timely-filed application for benefits submitted to the Workers' Compensation Commission that includes identification of the employer, the date and location of the accident and the injuries suffered. *See Cheski v. Arlington Cnty. Pub. Schs.*, 16 Va. App. 936, 938, 434 S.E.2d 353, 355 (citing § 65.2-601 and *Trammel Crow. Co. v. Redmond*, 12 Va. App. 610, 614, 405 S.E.2d 632, 634 (1991)).

Thus, neither the member contribution nor other employee-elected deductions made from payroll payments are assignments prohibited by § 65.2-531.

Finally, you ask whether the new 5 percent mandated member contribution toward retirement or other employee-elected deductions, such as health-care premiums and flexible reimbursement account deductions, are considered claims of a creditor and therefore prohibited.

Section 65.2-531 exempts workers' compensation benefits from the collection efforts of employees' creditors. This requires a creditor. The new 5 percent mandated member contribution is not claim of a creditor. The 5 percent mandated member contribution is a creation of the General Assembly, applicable to all Commonwealth employees; it does not arise from a debtor-creditor relationship and is not deducted to satisfy some other obligation to the Commonwealth or a third-party creditor. Further, as stated above, § 65.2-531 applies only to a "claim for compensation under this title." Because payroll payments and deductions are not claims for compensation under the Virginia Workers' Compensation Act, they fall outside the scope of the exemption. Thus, the mandated retirement contribution is not a claim of a creditor subject to the restriction of § 65.2-531. Moreover, other employee-elected deductions are requested by the employee and are instituted and terminated at his direction. They are not claims made by creditors against the employee's payroll payments. Thus, other employee-elected deductions made from payroll payments also do not constitute "a claim of a creditor" and are not prohibited by § 65.2-531.

Conclusion

Accordingly, it is my opinion that the term "regular payroll check" refers to both the timing of the check and the amount of the check, so that the proposed legislative change to § 65.2-524 adequately defines "regular payroll payment" to avoid any penalty. It is further my opinion that it makes no difference whether the deduction for the new retirement contribution begins before or after the injured employee is injured. Finally, it is my opinion that because neither the new 5 percent mandated member contribution toward retirement or other deductions elected by the employee, including health-care premiums and flexible reimbursement account deductions, constitute an assignment of benefits or a claim of a creditor, they are not prohibited by the Act and may be deducted in appropriate circumstances.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and cursive.

Kenneth T. Cuccinelli, II
Attorney General