

New York Wage Payment Regulations Struck Down

On September 7, 2016, the New York State Department of Labor adopted new regulations governing the payment of wages by direct deposit or payroll debit card. On February 16, the New York Industrial Board of Appeals invalidated those regulations, which had been scheduled to take effect March 7. Employers that had taken steps to ensure compliance with the new rules can put them on hold for now, but should continue to monitor developments.

Background

In recent years, the use of payroll debit cards as an alternative to checks, direct deposit and other payment methods has grown in popularity. Payroll debit cards provide employee access to wages that are transferred to an employer-established account with a financial institution, and many states now include such cards as a permissible form of wage payment.

On September 7, 2016, the New York State Department of Labor (NYSDOL) adopted controversial new [regulations](#) on how employees may be paid, effective March 7, 2017. The regulations, which addressed permissible methods of payment including direct deposit and payroll debit cards, would not have applied to employees working in a bona fide executive, administrative or professional capacity, making more than \$900 per week.

The regulations imposed new rules on employers that pay wages by direct deposit or payroll debit card, including additional notice, consent and recordkeeping requirements. Among other things, they required employers to provide employees with a written notice of rights and to obtain their employees' advance written consent to receive wages other than by cash or check. While employees would be able to revoke consent at any time, employers would be barred from requiring them to accept payment by either direct deposit or payroll debit card or to make such acceptance a condition of employment or continued employment. Employers would have to retain copies of each employee's consent during the period of his or her employment and for six years following the employee's final wage payment.



The regulations also contained special rules governing the payment of wages by payroll debit cards that required employers to:

- Secure the employee’s written consent to be paid by payroll debit card at least seven business days before initiating payment
- Ensure local access to at least one no-fee ATM within “a reasonable travel distance” from where they live or work
- Provide at least one method for employees to withdraw their full pay or any remaining account balance without incurring a fee
- Ensure that funds on a payroll debit card do not expire
- Provide at least 30 days advance written notice of any change in the terms and conditions of a payroll debit card, including changes in the itemized list of fees
- Obtain union approval to pay employees covered by collective bargaining agreements by payroll debit cards

In addition, the regulations prohibited employers (or payroll debit card providers) from:

- Charging employees fees for using the cards or accessing related services
- Using a debit card account linked to any form of credit (including a loan or cash advance)
- Passing on associated costs or receiving kickbacks or financial remuneration from the card issuer, sponsor or third-party processor

Comment. Employers that opt to pay employees by payroll debit cards must navigate a patchwork of federal and state laws to ensure compliance. While requirements governing use of those cards vary from state to state, New York’s recently invalidated regulations would have been among the most comprehensive and stringent.

Last October, Global Cash Card, Inc. (a payroll debit card vendor) challenged the portion of the regulations relating to payment of wages by payroll debit card.

NY Appeals Board Revokes Regulations

On Feb. 16, 2017, the New York Industrial Board of Appeals (Board) issued a [decision](#) revoking the regulations in their entirety before they could take effect. Because the regulations would have prohibited employers and financial institutions from charging fees to employees using payroll debit cards, the Board concluded that they were in effect regulating banking service. As such, they not only exceeded the New York Labor Commissioner’s authority to regulate the employment relationship, but also were preempted by federal and state banking laws. Further, the Board found that the NYSDOL was attempting to legislate through regulation restrictions on the use of payroll debit cards that the state legislature had failed to enact.

The decision also clarified that the New York Labor Law already addresses the concern that the regulations sought to ease – coercing low-wage workers without access to traditional bank accounts into receiving wages by payroll

debit card. While existing state law allows employers to pay wages by payroll debit cards, it does prohibit an employer from:

- Requiring an employee to receive wages by payroll debit card, and using that payment method without prior employee consent (see [New York Labor Law](#) Section 192)
- Directly or indirectly charging an employee to receive wages via a payroll debit card (see [New York Labor Law](#) Section 193)

The NYSDOL has not yet indicated whether it will challenge the Board's decision or consider revising the regulations.

In Closing

Employers that planned for changes in anticipation of new wage payment regulations on March 7 can put those plans on hold, at least for now. While monitoring developments, employers should consider reviewing their current pay practices and use of payroll debit cards both in and outside New York state.

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