



American Payroll Association

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Sent by e-mail: regulations@labor.ny.gov

Mr. Michael Paglialonga, Esq.
Associate Attorney
NYS Department of Labor, Building 12
State Office Campus, Room 509
Albany, New York 12240

**Re: Revised Rulemaking: Methods of Payment of Wages
LAB-21-15-00009-RP**

Dear Mr. Paglialonga,

The American Payroll Association¹ (“APA”) appreciates the opportunity to submit the following comments in response to the Revised Rulemaking (“Revised Rule”) issued by the New York State Department of Labor (“Department”) on October 28, 2015, regarding methods of wage payment. We thank the Department for addressing some of the concerns raised by the APA in our July 30, 2015, comment letter. Specifically, the Revised Rule allows employers to capture employee consent using electronic means, clarifies that employees must be provided locations of cash access in reasonable proximity to the employee’s home *or* residence, and omits certain provisions that conflicted with federal law.

Several of the APA’s concerns were not addressed, however, and we remain concerned that the Revised Rule imposes a number of unduly burdensome requirements on employers and payroll card providers² that will limit their ability to continue to offer this beneficial payment method in the state. In addition, portions of the Revised Rule remain vague, making compliance difficult for employers. As such, further revision is necessary. The APA welcomes the opportunity to work with the Department to develop a common sense rule that provides appropriate consumer protections while establishing a regulatory framework that supports the continued use of this beneficial wage payment method in New York.

¹ The APA is a nonprofit professional association representing more than 20,000 payroll professionals and their companies in the United States. The APA’s primary mission is to educate its members and the payroll industry regarding best practices associated with paying America’s workers while complying with applicable federal, state, and local laws.

² For purposes of this letter, “provider” refers both to financial institutions that issue payroll cards and to program managers.

Before addressing specific concerns with the proposed rule, the APA shares New York's concerns about protecting employees. However, we are concerned about requirements that may appear to benefit a few employees, but are overly burdensome on the majority of employees.

A. APA Concerns and Recommendations

1. The Seven-Day Cooling Off Period Is Impractical and Unduly Burdensome

The Department revised Proposed Section 192-2.3(a)(2) to allow employers to obtain an employee's consent to a payroll card during the onboarding process. However, the Revised Rule now requires employers to wait seven business days after obtaining employee consent before paying wages using the card. Simply converting the seven-day waiting period to a cooling off period after consent is obtained does not address most of the problems raised by the APA in our July 30, 2015, comment letter.

Specifically, the Revised Rule continues to require a multiple-step enrollment process whereby an employer must first make the required disclosures and obtain the employee's consent and then wait seven business days before taking action to pay the employee using a payroll card. Tracking the seven-day period for each employee will continue to be a tremendous burden under the Revised Rule, and will be particularly challenging for large employers with multiple locations in the state. These employers will need to rely on local personnel who may not understand the process or who may discourage the use of payroll cards because the enrollment process is too burdensome.

The cooling off period also creates new concerns as it is likely to give rise to considerable confusion among employees. Despite an employer's best efforts to explain the process, employees may not understand when payment to the payroll card account will begin or when they should activate their card and, therefore, how to access their wages. Adding to the frustration, employees may not understand why the employer is refusing to honor their payment selection. The APA also is concerned that by treating payroll cards differently than other payment methods, and subjecting them to a cooling off period, the Revised Rule stigmatizes payroll cards and suggests that there is something unsafe or inferior about the payment method.

The seven-day cooling off period also presents implementation challenges when cards are used to make one-time or isolated payments only, such as incentives and bonus payments. Unlike federal law,³ the Revised Rule broadly defines "payroll debit card" to include these cards. The seven-day waiting period (along with the notice and consent requirement) makes it virtually impossible to use payroll cards for isolated and one-time payments.

³ Regulation E applies only to card accounts used to make recurring payments of wages and other compensation. 12 C.F.R. § 105.2(b)(2). The APA urges the Department to adopt the federal definition.

According to the Department, the cooling off period is designed to protect employees who change their minds after consenting to a payroll card by ensuring that they are not forced to receive their initial wage payment via the payroll card. Forcing *all* employees to receive their initial payments by check if they do not participate in direct deposit is not a solution, however. Indeed, it will require a greater number of employees to receive their initial wages in a manner that they have expressly rejected.

Unbanked employees who receive paper paychecks during the cooling off period contrary to their wishes may incur costs to access their wages and pay their bills during this period.⁴ While proposed section 192-2.1(b) requires that employees be provided one location to cash his or her check without a fee, an unbanked employee who takes advantage of this free method may still need to purchase money orders or general purpose reloadable cards to pay bills or make purchases online. Regulators and consumer advocates, including the New York Attorney General and the National Consumer Law Center, have recognized that payroll cards can be a less expensive way for unbanked employees to receive their wages than a paper paycheck.⁵ Thus, requiring all employees who want a payroll card to receive their initial pay by check because a few may change their mind simply is not sound policy.

The seven-day cooling off period is unnecessary. The Revised Rule already includes numerous safeguards to ensure that employees are not forced to receive a payroll card against their will. Proposed section 192-1.3(b) makes absolutely clear that payroll debit cards may be offered only on a voluntary basis, that use of a payroll debit card may not be made a condition of hire or continued employment, and that employers may not exert any form of pressure on employees in an effort to obtain their consent. Thus, employees have ample time to consider their payment method selections without inconveniencing the rest of the workforce.

As additional protection, the following statement could be added to the notice and consent form to remind employees that they should read the program materials before making a payment selection: “This form includes important information about your wage payment options. Please review the form before selecting the payment option that is best for you.”

The seven-day cooling off period threatens to harm more employees than it seeks to benefit and should be eliminated from the final rule.

⁴ Proposed section 192-2.1(b) requires that employees be provided one location to cash his or her check without a fee. An unbanked employee who takes advantage of this free method may still need to purchase money orders or general purpose reloadable cards to pay bills or make purchases online.

⁵ National Consumer Law Center, *Rating State Government Payroll Cards* (November 2015) (“Accessing wages through a payroll card can be considerably cheaper than paying to cash a paper check.”); Office of New York State Attorney General Eric T. Schneiderman, *Pinched by Plastic* (June 2014) (“When compared to alternatives such as check cashing services, payroll cards can be a less costly wage payment option for employees, particularly if those employees take advantage of the fee-free services associated with the card.”).

2. The Notice and Consent Requirements Require Further Clarification

The Department's initial proposal required employers who offer payroll cards to provide certain disclosures to employees in their primary language or a language that the employee understands and to obtain the employees' consent. The Revised Proposal extends this requirement to direct deposit and responds to concerns raised by the APA and others that the language requirements were unduly burdensome. Several aspects of the notice and consent requirements remain vague or undefined, however, and need further clarification.

Template Development. The Department has proposed a system that would allow employers to satisfy the proposed language requirements using templates prepared by the Department. The APA is encouraged by this proposal and believes the templates may be a workable solution provided they are reasonable and do not cast payroll cards in a negative light. In this regard, the APA would welcome the opportunity to work with the Department to develop the templates. At the very least, we request an opportunity to review and comment on the templates before they are finalized. This is very important because these templates must not conflict with other labor and financial laws at the federal and state levels and must fit in with electronic management systems used by employers that may be accessible to employees for information.

Language Requirements. As mentioned above, the Department's initial proposal required employers to provide disclosures "in the employee's primary language or in a language that the employee understands." This provision was eliminated in the Revised Rule and has been replaced with the following: "The written notice and written consent shall be provided in English and the primary language of the employee when a template notice and consent in such language is available from the commissioner."

The Revised Rule does not address whether employers are required to use the templates or what requirements must be satisfied if an employer elects to prepare its own notice and consent forms. These issues are addressed in commentary to the Revised Rule, however. Specifically, comment 10 explains that the use of the template is optional and that employers may provide the notice and consent either in the employee's primary language, in a language the employee understands, or through a template prepared by the commission. The comment further explains that, if an employer elects to use a template and none exists that the employee understands, the employer may provide the employee with the commission's English template. The APA requests that the Department revise proposed section 192-1.3(d) to incorporate the issues addressed in the commentary and to provide guidance to employers.

The following is an example of potential language:

The written notice and written consent required by this section shall be provided in the employee's primary language, in a language that the employee understands, or through a template made available from the

commissioner. When no template notice and consent is available in the employee's primary language, the employer may comply with this section by providing that employee with a notice and consent in English.

Content of Notice. A few provisions of the notice and consent requirements remain so vague that it is difficult to determine what is required. While some clarity is likely to be provided when the Department issues its templates, the final rule itself should specify what is required so that employers know exactly how to comply. As an example, proposed section 192-1.3(a) requires that the notice include a list of locations where employees can access and withdraw wages at no charge within reasonable proximity to their place of residence or place of work. It is not clear whether all methods of cash access must be included on the list or just ATMs.⁶ The final rule should make clear that employers may satisfy this requirement by providing employees with a website and mobile applications that allow them to locate nearby ATMs. Requiring employers to track and disclose specific locations of cash access would be burdensome and add little value for employees in light of the other resources made available to them.

The required notice must also include "a statement that the employee may not be charged any fees for services that are necessary for full access to wages." Again, it is not clear what this provision requires, or what is meant by the phrase "services that are necessary for full access to wages." The APA is concerned that this requirement will give rise to considerable confusion among employees because the phrase is subject to varying interpretations.

Application to Direct Deposit. Application of the above notice requirements to direct deposit also is unclear. The final rule should make clear that the requirement to provide a list of locations of cash access and a statement regarding "fees for services necessary for full access to wages" apply only to payroll cards and not to direct deposit. Clearly, employers do not have access to information regarding the fees and locations of cash access associated with an employee's demand deposit account. These are matters between an employee and his or her financial institution.

3. Existing Payment Authorizations Should Be Honored

The Department has stated that once the final rule is published, employers will be required to obtain a new consent that complies with the final rule's notice and consent requirements from every employee who previously authorized payment by direct deposit or via a payroll debit card. If a new consent is not obtained, the employee must be paid by check.

⁶ A list of bank locations would seem to be unnecessary as employees can generally take a branded payroll card to any financial institution that is a member of the payment brand (i.e., Visa or MasterCard) and obtain their full wages from the bank teller at least once each pay period without cost.

The Department has long required informed consent before an employer may pay an employee by direct deposit or using a payroll card. In fact, Labor Law section 192(1) expressly provides that: "[n]o employer shall without the advance written consent of any employee directly pay or deposit the net wage or salary of such employee in a bank or other financial institution." In an October 2009 Opinion Letter, the Department declared that the language of section 192(1) is "broad enough to encompass the deposit of wages into a payroll/debit card account established for the payment of wages so long as the wages are deposited in a bank or other financial institution for the benefit of the employee."⁷ The Department went on to explain that for consent to be valid it must be obtained: (1) in writing after the inception of the employment relationship; (2) voluntarily, and not made a condition of employment; (3) in advance of the payment; and (4) with full disclosure of all terms and conditions, including fees associated with the use of the card.⁸ **Employers that relied on the Department's previous guidance when obtaining consent from employees should receive the benefit of such compliance.**

APA members pay 88.4% of their employees by direct deposit, 1.9% by payroll card, and 9.6% by paper check.⁹ Requiring employers to obtain a new consent from every employee who already participates in direct deposit or receives wages via a payroll card would be extremely burdensome and disruptive. As one APA member explains:

It is very difficult to connect with 5,000 employees (our electronic pay population in NY) on requests like this. This would be a tremendous and unnecessary burden. Employees are very happy with their electronic pay and about 95% are on direct deposit – many for years. They enrolled and consented voluntarily already. In addition to the burden of getting everyone's consent again, many will ask for an explanation – employees and management. Relaying a reasonable explanation and justification for this extra work to management at our 45 locations to be passed on to thousands of employees would be a challenge. Is it really worth the time of our thousands of employees and administrators? The biggest burden will be on our store location management in 45 locations who have to connect with just about every store employee – sometimes more than 250 employees working many different schedules.

Several APA members expressed similar concerns, as well as a concern that some employees will be reverted to a paycheck unknowingly because they do not read or respond to communications from their employer. By way of example, one APA member notified her employees that their initial payments would be by check rather than direct deposit. Still, several employees threw away their checks (thinking they were pay stubs) because they expected that their wages would be deposited into their

⁷ New York State Department of Labor, Counsel Opinion Letter dated October 29, 2009.

⁸ *Id.*

⁹ American Payroll Association, *2015 Survey of Salaries and the Payroll Profession*.

accounts. As you can imagine, this was extremely frustrating to those employees and a problem that New York has an opportunity to avoid.

APA members also noted that an employee who is accustomed to receiving wages by direct deposit to a checking or payroll card account may face serious hardship if he or she is automatically reverted to a paycheck. The employee may not realize that he or she needs to pick up a paycheck. Moreover, checks that are mailed may not get delivered; employees often do not update their address on file, or they provide incorrect addresses. An employee expecting to have wages deposited may overdraw his or her checking account and incur fees as a result. Employees who have set up automatic bill payment from their bank accounts may miss payments and incur late fees, potentially damaging their credit scores.

One APA member who works for a trucking company explained:

Notifying employees that a new law requires them to provide a new consent to direct deposit or a payroll card by a specific date does not sound bad on the surface, but corporate messages come out all the time and are ignored. Also, these are over-the-road truck drivers who may get home a couple days a month; some choose to stay out longer. We would end up removing the direct deposit/payroll card and would send a paper check. If they did not read their message (whether electronic or by mail) it could mean they miss a mortgage or car payment or that they can't feed their family that week because there are not funds in their account. To add to that, if they don't get home they won't be able to cash the check to get the funds.

The APA member concluded that there “seems to be an assumption that all employees show up to a physical location to work or go home every night after work. Not everyone does that.”

The APA urges the Department to reconsider its position that new consent will be required once the rule is finalized. Obtaining new consent would be extremely burdensome and disruptive, and is likely to cause substantial harm to some.

4. Undue Burdens on Providers Continue to Threaten the Availability of Payroll Cards in New York

Several provisions of the Revised Rule would place undue burdens on payroll card issuers and program managers while offering little or no benefit to employees. Again, these burdens will limit the ability of providers to continue to offer payroll cards in New York State, which in turn limits the ability of employers to make electronic wage payments available to unbanked workers.

Notice of Changes in Terms. Proposed section 192-2.3(g) requires that employees be provided with advance notice of changes in their payroll card account. This process differs from a similar provision of Regulation E by: (1) requiring 30 days advance notice of changes in terms and conditions rather than the 21 days

advance notice required under federal law, and (2) requiring notice of *any* change in terms and conditions of the account regardless of impact on the employee. Regulation E requires advance notice of adverse changes that would result in increased fees, increased consumer liability, fewer types of electronic fund transfers, or stricter limits on the dollar amount or frequency of transfers.¹⁰

Requiring issuers to institute unique processes in New York will significantly increase the cost and administrative burden of offering payroll cards in the State with little or no benefit to employees. Employees already receive advance notice of important changes to their payroll card program pursuant to Regulation E and can access the current terms and conditions on the provider's website at any time or request a copy from the provider. The Department removed other provisions from the Revised Rule recognizing that they were already addressed under federal banking law. The APA urges the Department to remove this provision as well.

Fee Prohibitions and Cash Access. The APA remains concerned that the Revised Rule's extensive fee prohibitions¹¹ combined with the required free banking services will make the issuance of payroll cards economically unsustainable in New York. Most concerning are the provisions prohibiting fees for unlimited in-network ATM withdrawals, account inactivity and certain declined transactions. The services associated with these fees are expensive for providers while the fees can easily be avoided by employees. The practical result will be that workers without checking accounts will be forced back into a cash-based economy, where many will incur fees simply to access their wages and pay their bills. Other employees may purchase general purpose reloadable ("GPR") prepaid cards and sign up for direct deposit. GPR cards typically carry much higher consumer costs than payroll cards.

The fact that payroll cards are offered through the employer channel should not make employers responsible for the costs of banking services that are not essential to full and free access to wages. As discussed above, the Revised Rule includes numerous safeguards to make sure that payroll cards are offered on a voluntary basis only and that employees are not coerced into this payment method. The final rule should reflect the policy goals of New York Labor Law, and ensure that employees are provided full and free access to wages. It should not attempt to legislate the provision of free banking services.

Implementation Period. The APA thanks the Department for adding a six-month implementation period to the Revised Rule. Employers and providers will need sufficient time to reprogram their systems, train their human resources and payroll staff, and update the required forms, procedures, and contracts. The amount of time needed will depend on a number of factors including the availability of the

¹⁰ 12 C.F.R. § 1005.8(a). Regulation E implements the Electronic Funds Transfer Act and requires that financial institutions provide a number of protections to consumers who hold covered accounts. Payroll cards have been covered by Regulation E since 2007.

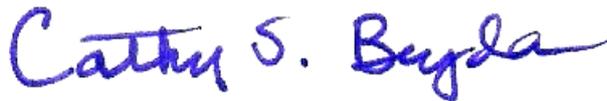
¹¹ Most concerning are the provisions prohibiting fees for account inactivity and certain declined transactions. The services associated with these fees are expensive for providers while the fees can easily be avoided by employees.

Department's templates, whether new consents are required, and the amount of time needed by providers to bring their programs into compliance. Establishment of an appropriate implementation period also should take into consideration the fact that the Consumer Financial Protection Bureau is expected to issue its final prepaid account rule in the spring of 2016. The APA believes that a 12-month implementation period is needed.

B. Conclusion

The APA supports the Department's efforts to establish standards for offering payroll cards that include important consumer protections for New York workers. We remain concerned, however, that the Revised Rule imposes a number of burdensome and costly requirements on employers and payroll card providers that make it unlikely that they will continue to offer this beneficial payment method in the state. This will hurt the very workers the rule seeks to protect. To avoid this result, the APA encourages the Department to establish regulatory requirements governing payroll cards that offer employees the greatest benefit while faithfully adhering to the letter and spirit of New York's Labor Law.

Sincerely,



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