



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

October 29, 2009

Carl Morris
America EPAY Inc.
8420 W. Bryn Mawr Ave, Suite 510
Chicago, IL 60631

Jesse Grasty
Franklin, Gringer & Cohen
666 Old Country Road, Suite 202
Garden City, NY 11530-2013

Steven Hochberg, Esq.
1700 Broadway, 21st Floor
New York, NY 10019

Andrew Wichern, Esq.
Messner & Reeves, LLC
1430 Wynkoop Street, Suite 300
Denver, CO 80202

Re: Request for Opinion
Paycards/Debit Cards
RO-08-0001
RO-08-0045
RO-09-0022
RO-09-0086

Dear Messrs. Morris, Grasty, Hochberg and Wichern:

This letter is written in response to your letters requesting an opinion as to the permissibility of utilizing direct payment cards/paycards ("debit cards") for the payment of wages under the New York State Labor Law. Since this letter is written in response to several requests for opinion which set forth different, albeit similar, factual circumstances, this response is intended to enunciate this Department's opinion as to the permissibility of the use of debit cards for the payment of wages in general under the New York State Labor Law. There are many different arrangements employers can make to pay employees through debit cards and the

Tel: (518) 457-2621, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

Department reserves the right to examine any individual employer's payroll/debit card plan to ensure that it is compliant with state law and regulations.

Section 192(1) of the Labor Law 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." While Section 192(1) may have been enacted into law well before the development of payroll/debit card wage payment options, the language of the section is, in the opinion of this Department, broad enough to encompass the deposit of wages into a payroll/debit 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. Accordingly, it is the opinion of this Department that the use of debit cards for the payment of wages, is permissible under the New York State Labor Law in certain circumstances. Since the permissibility of payments of wages through debit cards directly implicates Sections 191, 192, and 193 of the Labor Law, the requirements of those Sections, as they relate to debit cards, are discussed individually below. Please note, however, that activities identified as violating the provisions of the Labor Law in the below discussion are not intended to represent a comprehensive list and that adherence to such does not guarantee compliance in every possible case.

Labor Law Section 191

Section 191 of the Labor Law requires the timely payment in full of an employee's agreed upon wages and sets forth the frequency of such payments for particular categories of employees. For example, manual workers must be paid weekly and not later than seven days after the end of the week in which their wages are earned (Labor Law §191(1)(a)(i)), while clerical and other workers must be paid in accordance with the agreed terms of employment, but not less than semi-monthly, on regular pay days designated by the employer (Labor Law §191(1)(d).)

The provisions of Section 191 of the Labor Law do not prohibit the imposition of fees by a financial institution for banking services incidentally provided to the employee. However, fees for services that are essential for an employee to access his or her wages in full are prohibited as they deny the employee the full and timely payment of his or her wages. Examples of services which are essential to the employee's access to wages - i.e. services which may not be conditioned upon the payment of fees - include providing a method of withdrawals of wage accounts from the bank or financial institution, providing employees with a debit card and a replacement at reasonable intervals; and the maintenance of the account. Examples of non-essential services to the employee's full access to his or her wages - i.e. services which may be conditioned upon the payment of fees - include electronic money transfers, money orders, personalized checks, electronic bill-pay and fees associated with use of the debit card at other institutions such as retail outlets. Thus, a plan would violate Labor Law Section 191 if an employee is charged for any withdrawals of his or her wages from the bank of financial institution but not for additional banking services that the employee elects to use.

Furthermore, the application of Section 191 of the Labor Law to the payment of debit cards would require that such plans also adhere to the following:

- Timeliness: Any delay associated with an employee's ability to obtain his/her wages in full within the time required by Section 191 is a violation of that section. Such delays include holds for "clearance" of funds deposited. Delaying the employee's ability to make withdrawals against debit cards through scarcity of bank branches, or other methods for withdrawing funds from debit cards could also violate Section 191.
- Payment in full: Employees must be able to access the entirety of their wages, e.g. if the employee's wages are \$143.32, the employee must be able to receive \$143.32 in cash. Any restrictions or circumstances that prevent such access constitute a violation of Section 191 of the Labor Law. To avoid a violation, the employer must take positive steps to ensure that the employee is able to access such money. Steps to do so would generally include, but are in no way limited to, ensuring that bank branches where the employee could obtain the entirety of his/her wages are in close proximity to the employee and may be quickly and conveniently accessed.
- No encumbrances: Encumbrances that limit or delay an employee's access to wages violate Section 191. Examples of such encumbrances include minimum balances and "tolerance factors" used with point of sale transactions (e.g. those commonly imposed with pay-at-the-pump transactions, hotel rooms, and rental cars).

It is worth noting, however, that otherwise prohibited fees, e.g. for services essential for an employee to access his or her wages, levied by banks or financial institutions directly on the employer are not prohibited by Section 191, provided that such fees do not reduce, delay, hold or otherwise limit the employee's access to his/her wages. As such, an employer seeking to utilize debit cards for the payment of wages may elect to arrange with a bank or financial institution to have any fees billed directly to the employer in lieu of taking them out of the employee's account, thereby avoiding a violation of Section 191 of the Labor Law. Of course, any employer deduction from the employee's wages to pay the cost of such fees would be a violation of Labor Law Section 193 as discussed below.

Labor Law Section 192

As stated above, Section 192(1) of the Labor Law 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." Accordingly, no employee, except those exempted under Section 192(2), may be required to accept payment of wages through either direct deposit or a debit card. For consent to be valid, it must not be a condition of employment, since to do so would undermine the voluntariness and lower the requirement for consent to the functional equivalent of mere notification. Moreover, consent provided prior to the inception of the employment relationship is ineffective since Section 192(1) requires that the consent be from an "employee," further supporting the conclusion that such consent must be given after the inception of the employment relationship. Furthermore, full notice must be provided to the employee of all of the terms and conditions relating to the debit card option, including a full disclosure of fees associated with use of the card.

It is also worth noting that the non-application provision in subdivision 2 of Section 192, which exempts employees working in a bona fide executive, administrative or professional

capacity earning in excess of nine hundred dollars a week and employees working on a farm not connected with a factory, only operates to relieve an employer of the provisions of Section 192 and not those discussed above in Section 191 or below in Section 193.

Labor Law Section 193

Labor Law Section 193 prohibits deductions from wages except when such deduction is either: a) specifically authorized by law or; b) is a deduction that is authorized by the employee in writing, for the benefit of the employee, and is made either for the purposes expressly enunciated in Section 193(1)(b), or for a purpose similar to one of those expressly enunciated in Section 193(1)(b). (*see Angello v. Labor Ready*, 7 NY3d 579 [2006]; *Marsh v. Prudential Securities, Inc.*, 1 NY3d 146 [2003].) None of the purposes expressly enumerated relates to the payment of fees in relation to the payment of wages via debit cards. However, so long as fees do not relate to the employee's access to wages, thereby violating Section 191, and no part of those fees are remitted or otherwise directed to the employer or its subsidiary, permissible fees (see discussion under Section 191 above) imposed by a financial institution for banking services related to a payroll/debit card account would not run afoul of Section 193 of the Labor Law. Fees which are paid directly or indirectly to the employer, on the other hand, will be deemed to be a violation of Section 193 of the Labor Law. (*See, Angello v. Labor Ready, supra*, holding that the imposition of fees for the cashing of vouchers violates Section 193; *see also*, Labor Law Section 193(2), prohibiting employers from requiring impermissible deductions through separate payment.)

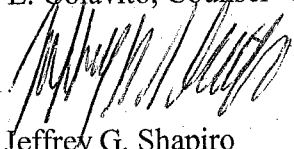
Additionally, please be reminded that Section 195(3) of the Labor Law requires employers to furnish each employee a wage statement, containing the information required by that statute, with every payment of wages and that such a wage statement must be furnished regardless of the method by which wages are paid.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:


Jeffrey G. Shapiro
Associate Attorney

cc: M. Patricia Smith
Carmin Ruberto
Terri Gerstein
Jennifer Brand
Mario Musolino
Colleen Gardner
Pico Ben-Amotz

Cathy Beyda
Margolis & Tisman LLP
601 Montgomery Street
San Francisco, CA 94111

Azba Habib
Via Fax: (404) 685-5380