PAYROLL CURRENTLY
The Compliance Publication from the American Payroll Association
Inside Washington July 1, 2016

APA Pleased, Concerned With Payroll Card Developments in Three States

Recent developments in payroll card requirements in three states – Connecticut, New York, and Pennsylvania – will affect APA members.

Connecticut authorizes payroll cards

In June, APA's Government Relations Division breathed a sigh of relief when Connecticut Governor Dannel Malloy finally signed S.B. 211 into law. The law authorizes employers to pay wages by payroll card. This legislation caps years of effort from APA and fellow stakeholders. The Connecticut Department of Labor previously refused to allow the payment method in part because the legislature was unable to enact legislation addressing it (see “Inside Washington” for March).

Connecticut's law is consistent with many state statutes in that it requires that employees provide voluntary written authorization for the payment method. It also ensures that consumer protections are built into the card programs. For instance, payroll card programs must be connected to an ATM network with widespread availability and must allow for unlimited electronic balance inquiries. To the extent possible, programs will not allow account overdrafts, and if an overdraft occurs, the employee will not be charged for it. Employees will not be charged for the first two declined transactions each month. Also, employees who stop using the cards before all the funds are expended will not be subject to dormancy fees for 12 months. Abandoned funds may be turned over to the state. An employer's obligations regarding a payroll account expire 60 days after the employment relationship ends.

One provision owes much to the doggedness of the Legal Resource Assistance Center, which advocates on behalf of the poor in Connecticut. If a payroll card receives only wage payments, it will be exempt from attachment by creditors. Anecdotal evidence suggests that some employees refuse electronic wage payments out of fear that their wages will be garnished twice, once by the employer and again by the bank.

The Connecticut statute differs from many others in that it ensures employees have three free withdrawals each pay period. Hawaii and Vermont are the only other states with such a requirement.

New York revises proposed regulations

On June 15, the New York State Department of Labor (NYSDOL) released revised proposed regulations addressing wage payments (NYS Register, 6-15-16; http://docs.dos.ny.gov/info/register/2016/june15/pdf/rulemaking.pdf). The proposed regulations applying to payroll cards are more restrictive than any law or regulation now in effect in any other state.

APA is concerned that New York's proposed regulations are so restrictive that some card providers will find their current business models threatened. In turn, employers may have reason to wonder if they will be able to continue to offer payroll cards to employees in New York.

Fees that card providers routinely charge in other states may be prohibited in New York. Card providers will be unable to charge inactivity fees. The regulations allow providers to close accounts due to inactivity but require that any remaining funds be returned to the employee by check within seven days. New York's proposed regulations also totally prohibit charges for an overdraft, shortage, or a low balance status.

The proposed regulations require that employees be given "local access to one or more [ATM] machines that offer withdrawals at no cost to the employee." "Local access" is not defined, and NYSDOL admits that the term will have very different meanings in urban and rural settings.

A declined transaction fee may not be charged at any ATM that does not offer free balance inquiries. It is unlikely an out-of-network ATM will offer free balance inquiries, so this cost will either be absorbed by the card provider or passed onto the employer.

In November 2015, APA offered comments on the previously proposed rules, which are nearly identical to those released last month (http://info.americanpayroll.org/pdfs/gov/APA_Comments_NYDOL-NPRM.pdf). APA said it "remains concerned that the Revised Rule's extensive fee prohibitions combined with the required free banking services will make the issuance of payroll cards economically unsustainable in New York. … 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."

The NYSDOL regulations make using the cards harder for employees as well. Cardholders must provide written consent seven days before employers can transfer funds to the card. If the current regulations are put into effect, this new provision will apply even to employees who have already chosen to receive pay on a payroll card. Many employees who have been receiving their wages on payroll cards for years will receive a paper check during the consent process. Services provided through the payroll card account, such as bill pay, may also be interrupted.

Pennsylvania legislation pending

In May, the Pennsylvania Senate introduced S.B. 1265, which would recognize and regulate wage payments by payroll card. In support of the bill, APA wrote, "If enacted, S.B. 1265 would codify the existing administrative position that payroll cards are a permissible method of payment in Pennsylvania while ensuring that appropriate consumer protections, including employee choice and full and free access to wages, are in place" (http://info.americanpayroll.org/pdfs/gov/APA_letter_PA-1265.pdf).

APA's support is in no small way related to a class action lawsuit still pending in the commonwealth. In *Siciliano v. Mueller*, plaintiffs argued that paying wages on a payroll card violates the Pennsylvania Wage Payment and Collection Law, which requires that wages be paid in "lawful money of the United States or check." APA submitted a friend-of-the-court brief asking the judge not to rule that payroll cards are illegal in Pennsylvania (see "Inside Washington" for April). If S.B. 1265 is enacted, that line of argument would become irrelevant to the court case.

At its core, *Siciliano* is an attempt to recover damages for employees who were paid on payroll cards without being offered the choice of direct deposit or paper checks. Summarizing S.B. 1265, APA wrote that "the bill would ensure that employees are able to withdraw the full amount of their net wages each pay period without charge, that the account is held at a federally insured financial institution, and that the employee is provided disclosures, access to account information and other protections required under federal Regulation E. The bill would also make clear that, moving forward, payroll cards could only be offered on a voluntary, opt-in basis."