



February 10, 2017

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

Michael Paglialonga
NYS Department of Labor, Building 12
State Office Campus, Room 509
Albany, New York 12240

Re: Methods of Payment of Wages
Notice and Consent Templates

Dear Mr. Paglialonga,

The American Payroll Association (APA), NACHA–The Electronic Payments Association, and the Association of Financial Professionals (AFP) appreciate the opportunity to provide feedback on the notice and consent templates posted by the New York State Department of Labor (Department) on January 19, 2017, in connection with its Final Rule on Methods of Payment of Wages (Final Rule or Rule), codified at 12 NYCRR Part 192. At the outset, we remain concerned regarding the continued viability of payroll debit cards in the State of New York given the onerous requirements of the Rule. We have learned from some APA members that they will not offer payroll debit cards in New York as a result and from others that they are still determining whether it is feasible to continue doing so. Some members report that their providers may leave the New York market.

For many companies, the templates are a crucial consideration when determining whether they are able to comply with the Rule. In this regard, our organizations are concerned that the templates do not satisfy the requirements of the Final Rule and that they contain some significant errors.¹ It is vital that the templates be corrected so that employers may rely on them with confidence and without fear that they will be in violation of the Labor Law when doing so. In addition, we are concerned that the templates will not be finalized and translated far enough in advance of the Rule's March 7, 2017, effective date for our members to integrate the templates into their payroll systems and provide the required notice to employees who currently receive

¹ In addition to the concerns identified in the body of this letter, we recommend against stating that “on this day” the employee was notified of his or her payment options as the employee may have received those options on a previous date. Moreover, the section requesting the employer’s address and phone number is unclear – which address and whose phone number? Finally, the templates also include a few typographical errors (e.g., the direct deposit form states “As a New York State employer, we *must can* pay...”).

their wages electronically. For this reason, we respectfully request that the Department correct the templates and delay the effective date of the Final Rule for at least three months from the date when the final templates are made publicly available.

To help facilitate finalization of the templates we have attached a proposed revision that addresses the concerns raised in this letter.

Compliance Concerns

As mentioned above, the draft templates do not satisfy the requirements of the Final Rule in several important ways. First, they do not provide employees with “a plain language description of all of the employees’ options for receiving wages,” as required by section 192-1.3. Instead, they simply notify employees of the legal requirements relating to consent for each method of payment. As a result, employees offered direct deposit would not be able to ascertain from the direct deposit template whether their employers also offer payroll debit cards or whether they will be paid in cash or by check should they elect not to consent to an electronic payment method. A similar problem would arise when employees are provided the draft template for payroll debit cards.

Section 192-1.3 also requires that the notice for electronic payment methods include a statement that “the employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full.” However, the template for payroll debit cards introduces a new and vague concept by advising employees that they may not be charged fees for “regular use” of the payroll card account. To avoid confusion and facilitate compliance, the templates should be revised to correspond with the regulatory language and its requirements.

Finally, the template for direct deposit erroneously states that the employer “must receive your written consent at least seven business days prior to paying wages by direct deposit.” Section 192-2.3(a)(2) imposes a seven business day cooling-off period after an employee consents to a payroll debit card, but not when the employee consents to direct deposit. As such, even if the cooling-off period is addressed in the templates – and the Rule does not require that it be mentioned – it should be addressed in the context of payroll debit cards only.

Practical Considerations

1. The Templates for Direct Deposit and Payroll Debit Cards Should Be Combined

The Department has drafted separate templates for direct deposit and payroll debit cards. We recommend that the forms be combined. Alternatively, if the Department prefers to have a separate direct deposit template for employers who do not offer payroll debit cards, the second template should address both direct deposit and payroll debit cards together. Practically speaking, employers who offer payroll debit cards almost always offer traditional direct deposit as well. A combined form ensures that employees are provided with required information about all of their payment options, eliminates the possibility that one of the forms will be lost or not provided, and reduces the likelihood of confusion caused by multiple disclosure forms. A combined form also accommodates employees who choose to participate in both direct deposit and payroll debit cards using split deposits.

2. The Templates Should Not Incorporate a Direct Deposit Enrollment Form

The draft direct deposit template also serves as a direct deposit enrollment form. Our organizations strongly recommend against this use. Employers should be permitted to attach their standard English direct deposit enrollment forms to the Department's notice and consent template(s). These forms reflect the employer's policies on direct deposit, specifically their policies and procedures on split deposits, and have been accepted by the Department for decades. A recent study shows that approximately one in four employees split their deposits between their checking accounts and other designated accounts such as savings accounts, 401(k) and other retirement savings plans, business accounts, money market accounts, and prepaid cards.² Split deposits serve as an important budgeting tool and promote savings. In fact, the Consumer Federation of America and NACHA strongly promote the use of split deposits to encourage employee savings.³

While the Department's template provides room for employees to designate two accounts for direct deposit, many employers allow split deposits to four or more accounts. Some employers do not offer split deposits at all. Because a template system does not allow for customization to reflect and explain an employer's split deposit policy, employers with policies that permit deposits to more than two accounts would be precluded from using the templates and forced to create and translate their own notice and consent template(s). This would have a chilling effect on an important consumer benefit. To avoid this result, the direct deposit enrollment form should be separate from the template.

3. The Templates Should Address Employees Who Currently Participate in Electronic Pay

Our organizations greatly appreciate the Department's decision to recognize the continued validity of electronic payment authorizations obtained from employees prior to the Rule's March 7, 2017, effective date. Specifically, the Department advised that "consents given without the requisite notices will remain valid so long as such notices are provided to employees before the effective date of this rule and employees are expressly notified of their right to withdraw consent to direct deposit or payroll debit card through such notices."

Unfortunately, it is unclear how the draft templates are to be used in the context of employees who currently receive their pay electronically. APA, NACHA, and AFP respectfully request that the Department either: (1) issue a separate template notice for these employees, or (2) provide a cover letter in the 11 required languages informing employees that the notice and consent template is being provided to them for information purposes only, that they need not sign or return the form to their employer, and that they may withdraw their existing consent at any time. If no such template or cover letter is provided, employers will be forced to prepare their own notice and consent template(s) notwithstanding the Department's assurance that it "will prepare

² NACHA and Javelin, *Beyond Simple and Safe: Opportunities to Expand the Use of Direct Deposit Via ACH for Payroll* (April 2016).

³ NACHA Celebrates America Saves Week, <https://www.nacha.org/news/nacha-celebrates-america-saves-week-feb-22-27-and-encourages-saving-through-direct-deposit-ach>.

templates that contain all of the information necessary for compliance with the requirements of the rule.”⁴

4. *The Rule’s Effective Date Should Be Extended*

At best, the final templates will be made available three weeks before the Rule’s March 7, 2017, effective date. For this to happen, the Department would need to review all feedback on the draft templates and then correct, translate, and publish the final templates within two business days of the February 10, 2017, deadline for providing feedback. Even if that were possible, employers still would not have sufficient time to review the final templates for compliance, ensure that existing employees are notified of their rights, and integrate the templates into their payroll and onboarding processes. Human Resources and payroll personnel need to receive training on the specifics of the templates, and electronic self-service platforms need to be reprogrammed to accommodate the final forms.⁵ APA, NACHA, and AFP respectfully request that the Rule’s effective date be extended to three months after the final templates are made publicly available so that all of these tasks can be accomplished carefully and in a manner that ensures compliance.

Conclusion

APA, NACHA, and AFP appreciate the opportunity to provide feedback on the draft templates and would be happy to discuss the above issues with you further. In this regard, please feel free to contact Bill Dunn (202-232-6889), Cathy Beyda (650-320-1824), Bill Sullivan (703-561-3943), or Jeff Glenzer (301-907-2862).



Cathy Beyda, Esq.
Chair, GRTF Payroll Card Subcommittee
American Payroll Association



William Dunn, CPP
Director of Government Relations
American Payroll Association



William D. Sullivan
Senior Director and Group Manager
NACHA-The Electronic Payments Association



Jeff Glenzer
Vice President & Chief Operating Officer
Association of Financial Professionals

⁴ Notice of Adoption, *Methods of Payment of Wages* (Assessment of Public Comment, Response 3, September 7, 2017).

⁵ Indeed, APA members already are having a difficult time trying to program their self-service platforms to accommodate the 7 business day cooling off period.