



American Payroll Association

Government Relations • Washington, DC

July 30, 2015

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: Notice of Proposed Rulemaking: Methods of Wage Payment
LAB-21-15-00009-P**

Dear Mr. Paglialonga,

The American Payroll Association (the “APA”) appreciates the opportunity to submit the following comments in response to the Proposed Rulemaking (the “Proposed Rule”) issued by the New York State Department of Labor (the “Department”) on May 27, 2015 regarding methods of wage payment. The Proposed Rule fills a gap in the New York Labor Law by clearly identifying permissible methods of wage payment in the State. It then establishes certain standards for each method of payment, focusing primarily on payroll debit cards.

As a general matter, the APA supports the Department’s efforts to adopt rules that ensure that all employees have full and free access to their wages and define the responsibilities of employers with respect to each method of payment. We are concerned, however, that the Proposed Rule imposes a number of burdensome and costly requirements on payroll debit cards that are not imposed on other methods of payment and go beyond requiring full and free access to wages. These requirements will make it less likely that employers and issuers will be able to continue to offer this beneficial payment method in the State of New York. In addition, we are concerned that a number of the provisions of the Proposed Rule are vague and, therefore, provide employers with little guidance as to what is needed to comply.

The APA’s specific comments on the Proposed Rule are set forth below. In addition, we have included some suggested revisions that are designed to address our concerns while meeting the Department’s objective of ensuring important consumer protections for employees who elect to receive payroll debit cards. The APA appreciates the opportunity to comment on the Proposed Rule and would be pleased to discuss any of the points mentioned in this letter more fully.

A. The American Payroll Association

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. In addition, the APA's Government Relations Task Force (the "GRTF") works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

In 2004, the GRTF formed a Payroll Card Subcommittee in response to an increased interest in the use of payroll debit cards by our members. This subcommittee monitors the development and use of payroll debit cards within the employer community and helps educate policymakers and regulators about payroll debit card program benefits. Since 2004, the committee has supported numerous legislative and regulatory initiatives that provide employers with clear guidance on their responsibilities under the law, ensure that employees have full and free access to their wages on payday, and require that employees be provided with information on how to use a payroll debit card to their best advantage. As of 2013, 17.6% of APA members offered payroll debit cards to their employees.¹

B. The Employer's Perspective on Payroll Debit Cards

1. Employers Offer Payroll Debit Cards for a Variety of Reasons

Together with traditional direct deposit, payroll debit cards allow employers to deliver wages to their employees in a timely manner. This is especially important when employees are away from the workplace and during periods of severe weather and national disasters when mail delivery can be impeded. Not surprisingly, many APA members first decided to offer payroll debit cards after severe weather conditions and national disasters delayed the delivery of wages at a time when employees needed access to their funds the most.

In addition, many employers offer payroll debit cards as a means of financially empowering employees who do not have a bank account or have limited access to traditional banking services. Payroll debit cards allow these "underserved" employees to enjoy the convenience and security that their co-workers enjoy with direct deposit. As one APA member explained:

We have a large population of un-bankable [team members] that do not have access to all of the functions of a regular bank account. They cash their checks at a check cashing service costing them a percentage of each check. They then walk around with cash in their pockets to either obtain money orders or go to a store with bill pay to pay their utility bills. With a payroll debit card they now have the freedom of paying bills online, have a way to store money other than the cash sitting in their house and it saves them check cashing fees.

¹ American Payroll Association, 2013 Survey of Salaries and the Payroll Profession.

Finally, many employers decide to offer payroll debit cards as a means of streamlining payroll processes and reducing payroll costs. Among other things, payroll debit cards allow employers to reduce their reliance on paper paychecks and related processes, and transfer escheatment responsibility to the card issuer. Many, but not all, employers report that they have been able to enjoy cost savings after implementing a payroll debit card program. This is particularly true for employers who rely on overnight delivery services to distribute payroll.

2. Employers Select Payroll Debit Card Vendors With Their Employees' Interests in Mind

As discussed above, many employers offer payroll debit cards as a benefit to their employees. As such, employers typically exercise great care and diligence when selecting a payroll debit card vendor. In fact, it is not uncommon for APA members to interview four to six companies before selecting a vendor. The selection process may involve several different departments including payroll, human resources, IT and legal. Many of our members develop and use lengthy questionnaires and RFIs/RFPs to ensure that the right combination of features is delivered to their employees.

When asked what key factors they take into account when selecting a vendor, our members frequently cite: (1) the ability to access net wages without incurring a fee; (2) the vendor's commitment to compliance; and (3) customer service. In addition, many of our members looked for programs that offer extra features that help employees manage their finances such as bill pay options, mobile applications, and savings plans.

3. Employees Reap Many Benefits From Payroll Debit Cards

Many APA members have followed up with employees who selected the payroll debit card option to ensure that the program has fulfilled its promise. The results are a resounding YES! Employees report that they enjoy the flexibility, security, convenience, and cost savings that payroll debit cards offer. They like the fact that they do not have to carry around cash, thereby reducing the risk of loss and theft. Employees also like that they can pay their bills online or over the telephone, and that they can use their payroll debit cards wherever Visa and MasterCard are accepted. Some report that the Visa and MasterCard branding offers them prestige.

Employees also explain that they save time because they do not have to travel to the workplace to pick up their check, or travel long distances to pay their bills. They also save money because they do not have to pay to cash their checks or purchase money orders to pay their bills. Finally, many employees report that payroll debit cards allow them to manage their finances and prioritize their spending, as they have access to a record of their transactions and are provided with tools that allow them to check their account balance at any time.

These responses are consistent with a recent study of 2,300 active cardholders commissioned by Visa. The study revealed that:

- 87% of payroll debit cardholders agree that their payroll debit card saves them time versus having to cash a check or buy money orders to pay bills;
- 85% of payroll debit cardholders agree that their payroll debit card is easy to use for their monthly purchases; and
- 81% of payroll debit cardholders believe that their payroll debit card helps them track their money better than cash.²

C. APA Concerns and Recommendations

1. Consent Requirement (Proposed §§ 192-1.2(b), 192-2.3(a))

Section 192 of the New York Labor Law requires voluntary participation in electronic wage payment. Consistent with this requirement, the Proposed Rule requires an employee's voluntary written consent to receive his or her wages to a payroll debit card account. The Proposed Rule emphasizes this point by making clear that participation may not be made a condition of hire or continued employment, and by prohibiting any form of intimidation or coercion for refusing to accept the payroll debit card account. Thus, under the Proposed Rule, payroll debit card accounts are simply another account that an employee may designate for the direct deposit of his or her wages and other compensation.

The APA requests clarification on one aspect of the consent requirement. Specifically, we request that the Department make clear that the *written* consent requirement includes consent obtained electronically so long as the employer has a way of capturing, and retaining a record of, the consent. Today, many employers provide their employees with a self-service portal that allows them to easily select their benefits and payment options online. When offered, employee self-service provides employees with around the clock access to information about their benefits, employment, and pay.

2. Pre-consent Disclosure Requirements (Proposed § 192-2.3(a)(2))

Proposed section 192-2.3(a)(2) requires that employers provide their employees with a number of disclosures prior to seeking the employees' consent to receiving wages by payroll debit card. The APA agrees that disclosure of the terms and conditions of the payroll debit card account, including fees, is important to ensure that employees are able to make an informed decision regarding their wage payment options and, if the payroll debit card option is selected, that employees have the information they need to use their payroll debit cards to their best advantage. Nevertheless, the APA is concerned that the disclosure requirements, as drafted, are unduly burdensome, cast payroll debit cards in a negative light, and are vague. These concerns are discussed more fully below.

a. The Seven-Day Waiting Period

The Proposed Rule would require employers to wait seven business days after providing the required disclosures before seeking an employee's consent to receive a payroll debit

² Results based on a 2013/2014 online survey of 2,300 active Payroll cardholders conducted by Ipsos, as a commissioned agent of Visa.

card. It is a recognized best practice for employers to provide their employees with information about their wage payment options during the onboarding process. As one of our members stated: *“We find during the onboarding process that employees are very engaged and willing to take the time to ask questions.”*³ Allowing employees to elect their preferred payment option during the process ensures that employees are able to receive their initial wage payment on payday and in the manner that they prefer.

Under the Proposed Rule, however, employees could elect any payment method, except a payroll debit card, during the onboarding process. The Proposed Rule would require a two-step enrollment process for payroll debit cards that will be inconvenient and burdensome for both employers and their employees, and discourage the use of this beneficial payment method. One of our members explained:

We have many employees in New York who choose payroll cards after reviewing the disclosures and rules with our personnel department. It would be unfair and leave a bad first impression to make these employees wait two weeks before receiving this benefit, plus the process would take more of the employees’ time a week later to give consent after they’ve already made a decision. It would also be very burdensome for our store personnel to keep track of this seven-day time period for multiple employees with various start dates, and then track them down after they have started working – particularly as personnel would have already reviewed disclosures previously with the employee.

The APA understands that the Department wants to ensure that employees are provided an opportunity to review program materials before selecting a payment method. At the same time, we believe that employers should be allowed to immediately honor an employee’s request to receive their wages by credit to a payroll debit card account. Denying them the ability to do so suggests that payroll debit cards are unsafe or an inferior payment method, which reflects poorly on the company. The APA believes that a defined waiting period is unnecessary as the Proposed Rule makes absolutely clear that payroll debit cards must be offered on a voluntary basis, that use of a 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, any employee wishing more time to consider his or her payment options must already be given an opportunity to do so.

Nevertheless, to alleviate the Department’s concerns, we suggest that the Proposed Rule be revised to require employers to notify employees that they have a right to review program materials before making a payment selection. For example, the pre-consent disclosure could include the following statement, which does not cast doubt on any particular payment method.

³ Similarly, the payroll manager for a construction company explained that its employees do not have a permanent work location but are sent to jobsites that can be a hundred miles away. She noted that “the new hire orientation is one of the few opportunities the company has to sit down with employees and share information.”

This form includes important information about your wage payment options. Please review the form before selecting the payment option that is best for you.

In addition, the definition of consent set forth in proposed section 192-1.2(b) could be revised as follows:

Consent shall mean an express, advance, written or electronic authorization given voluntarily by the employee and only given following receipt by the employee of written notice of all terms and conditions of the payment and an opportunity to review the terms and conditions.

b. Content of Pre-consent Disclosures

As noted above, the proposed definition of “consent” appropriately requires that employees be provided with a written copy of the terms and conditions of the payroll debit card program before they consent to the payment method. Proposed section 192-2.3(a)(2) requires that employers disclose the following four additional items before seeking an employee’s consent: a description of all payment options, two “warnings” about the payroll debit card option, and a list of locations where employees can access their wages without cost. These disclosures, including the information about an employee’s payment options and free cash access, are only required when employees are offered a payroll debit card.

The two “payroll debit card warnings” relate to employee consent and full cash access, and suggest a bias against payroll debit cards and a distrust of employers who offer them. While many states require that employers notify their employees that direct deposit and payroll debit cards are voluntary payment options, the Proposed Rule would require disclosures in New York to include a statement that “the employer may not require the employee to accept wages by payroll debit card or by direct deposit.” Similarly, while other states require employers to explain to employees how to access their wages in cash without charge, the Proposed Rule would require employers to include a statement that “employees may not be charged any fees for services that are necessary for the employee to access his or her wages in full.” Again, these statements unnecessarily paint payroll debit cards in a negative light. We request that the Department replace the current payroll debit card warnings with neutral statements like the examples offered from other states.

Finally, proposed section 192-2.3(a)(2) would require employers to provide each employee who is offered a payroll debit card with an individualized list of locations “within reasonable proximity to the employee’s place of residence and place of work” where the employee can access his or her wages without cost. This requirement is unduly burdensome, unnecessary, and vague. It would be extremely difficult administratively for employers to track the precise locations of cash access relative to each employee’s place of work and residence and prepare personalized disclosures based on this information.

Moreover, it is unclear what exactly must be included on the list. The Proposed Rule merely refers to locations “where employees can access and withdraw wages at no charge to the employee.” The statement, as written, is not limited to locations where employees are able to access their full net wages. Does this mean that the employer must

include every ATM, financial institution, and other establishment within reasonable proximity where the employee could access wages without charge? Would this mean that retail locations that provide cash back at the point of sale also must be included? The APA believes that no list is necessary because employees can take a branded payroll debit 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. In other words, employee-cardholders can go to virtually any financial institution branch location and cash out their net wages, like they would a paper paycheck, without cost. This is more than 90,000 locations nationwide and over 5,500 in New York State. Employees also are provided a telephone number and website that allows them to easily locate nearby in-networks ATMs. As such, we request that the Department remove the requirement from the final rule. Instead, we recommend that employers be required to include in their disclosures an explanation of how employees can access their wages without cost (e.g., 1 withdrawal a pay period at any financial institution displaying the Visa/MasterCard logo; 1 withdrawal each pay period at any ATM within the XXX ATM network).

c. Language Requirements

Finally, the Proposed Rule would require that the pre-consent disclosures be provided “in the employee’s primary language or in a language that the employee understands.” Such comprehension standards are subjective and are likely to lead to disputes. Indeed, there is nothing to prevent an employee who voluntarily and enthusiastically consented to a payroll debit card from later claiming that he or she “did not understand” should a dispute later arise. It would be difficult for an employer to defend itself against such a claim.

The APA requests that the Proposed Rule be revised to require that the pre-consent disclosures be provided in the language(s) that the employer normally uses to communicate employment-related policies to its employees.⁴

d. Alternative Disclosure Language

Based on the above comments and recommendations, the APA offers the following alternative to proposed section 192-2.3(a)(2).

When offering employees the option of being paid wages to a payroll debit card account, the employer shall provide the employee with written disclosure in plain language of all of the following. The disclosure must be provided in the employee’s primary language or the language the employer normally uses to communicate employment-related policies to its employees.

⁴ In a recent meeting with the APA, the Department suggested that a possible solution to the language requirement would be for the Department to prepare a standardized fact sheet relating to payroll debit cards that the Department would make available on its website in a variety of foreign languages. The APA would need more information before we could provide specific comments on such a proposal. As we mentioned during the meeting, however, we are concerned that such a fact sheet might portray payroll debit cards in a negative light. To the extent that such a fact sheet is developed, it should address all permissible methods of wage payment and do so in a neutral and objective manner.

- (1) A plain language description of all of the employee's options for receiving wages;
- (2) A statement encouraging employees to read the information provided about their wage payment options, similar to the following: "This form includes important information about your wage payment options. Please review the form before selecting the payment option that is best for you."
- (3) A statement that receiving wages by direct deposit or using a payroll debit card is voluntary;
- (4) The terms and conditions of the payroll debit card account including a list of fees that may be assessed by the card issuer;
- (5) A statement that third parties may assess additional fees;
- (6) An explanation of how the employee may access his or her full net wages from the payroll debit card account without cost, at least once each pay period; and
- (7) A statement that the employee may change his or her payment selection at any time upon reasonable written or electronic notice to his or her employer.

3. Fee Prohibitions (Proposed § 192-2.3(c))

Proposed section 192-2.3(c) prohibits almost all fees that may be incurred when using a payroll debit card. While providing employees with free banking services would seem to be a significant benefit to employees, the APA recognizes such a program is not economically viable and is likely to result in payroll debit cards being unavailable to employees in New York. To avoid this result, the APA urges the Department to revise the Proposed Rule to reflect the policy goals of New York's Labor Law, rather than attempting to institute impractical price controls.

Section 191 of the New York Labor Law requires the timely payment in full of an employee's agreed upon wages. Until now, the Department has interpreted section 191 as prohibiting fees for services "that are essential for an employee to access his or her wages in full" but not fees "for banking services incidentally provided to the employee."⁵ The Proposed Rule deviates substantially from the above standard and would subject employers to significant penalties for violation of the Labor Law if they fail to provide one group of employees (those that elect a payroll debit card) with a number of discretionary banking services for free.⁶

⁵ The Department identified the following examples of services which are essential for an employee's access to wages: providing "a" method of withdrawing wages from the payroll debit card account, providing employees with a payroll debit card, and providing replacement cards at reasonable intervals. *See*, New York State Department of Labor Counsel Letter dated October 29, 2009).

⁶ An employer who fails to pay wages in accordance with Article 6 (Payment of Wages) of the New York Labor Law will be required to pay a civil penalty of \$500 for each violation. N.Y. Labor Law § 197. In addition, an employer that fails to pay wages due may be held liable for liquidated damages equal to 100%

The fact that the employer selects the payroll debit card program and may negotiate some terms should not render the employer responsible for the cost of services that are not essential to full and free access to wages. Employees retain the option of receiving their wages by direct deposit to another bank account of their choosing or by paper paycheck. As the Department recognized in a recent meeting with the APA, even employees without traditional bank accounts may elect to receive their wages by direct deposit to a general purpose reloadable prepaid (GPR) card account rather than receiving a payroll debit card. There are dozens of different GPR cards available in the market today from which an employee may select, offering a variety of different terms and conditions.

Thus, access to the account through the employer channel should not trigger a separate set of rules. The payroll debit card is a purely voluntary payment option like other forms of direct deposit. Beyond fees that deny employees the ability to access their net wages without cost, the payroll debit card fee schedule should be left to negotiation between the employer and the issuer, based on the needs of the particular employment situation, and market competition.

Some of the Proposed Rule's fee prohibition that are most disturbing are the provisions prohibiting fees for all in-network ATM withdrawals, in-network ATM balance inquiries, maintenance of an abandoned account, and declined transactions. These services are expensive to provide. For example, many payroll debit card issuers do not own their own ATMs but must contract with a third party provider for in-network access. In the payroll debit card context, these costs cannot be recouped through monthly maintenance fees or minimum account balances like they often are when wages are paid by direct deposit to an employee's checking or savings account. These fees can easily be avoided, however, and many employees choose to do so.

Finally, we note that some of the fee prohibitions set forth in proposed section 192-2.3(c) are vague and make it unclear what is intended. For example, the prohibitions on fees for "other transactions," "other action necessary to receive wages," and "other actions necessary to hold the card" offer little guidance on how to comply. Conceivably, these broad provisions could encompass any fee associated with a payroll debit card account and, therefore, should be removed from any final rule.

4. Banking Law Protections (Proposed § 192-2.3(b), (g), (h))

The Electronic Fund Transfer Act (the "EFTA") and its implementing regulation, Regulation E, require *financial institutions* to provide a number of consumer protections on payroll debit card accounts. The Proposed Rule modifies many of these consumer protections and incorporates them into New York's Labor Law, making *employers* responsible (and potentially liable) for services beyond their control.

of the amount of the total amount of wages found to be due. *Id.* at §§ 198(1-1), 218. Willful and repeat violations will be subject to double penalties. *Id.* If the violation is for a reason other than failure to pay wages, the Commissioner may order a civil penalty of up to \$1,000 for a first violation, \$2,000 for a second violation, or \$3,000 for subsequent violations. *Id.* at § 218. In addition, an employer who fails to pay wages in accordance with the wage payment law is guilty of a misdemeanor punishable by a fine of \$500 to \$20,000, or imprisonment of up to 1 year for a first violation. *Id.* at § 198-a(1). Subsequent offenses occurring within 6 years are punishable by a fine of \$500 to \$20,000, imprisonment for not more than one year and a day, or both. *Id.*

Specifically, the Proposed Rule would require issuers to modify their existing procedures related to error resolution, access to account information including transaction histories, and change in terms notices.

The incorporation of modified Regulation E protections into New York's Labor Law is problematic for at least three reasons. First, requiring issuers to institute unique processes in New York will further increase the cost and administrative burden of offering payroll debit cards in the State. Second, making employers responsible (and subject to liability) for banking law compliance will create costly and unfamiliar audit burdens for employers. This cost and risk will reduce the number of employers willing to offer payroll debit cards and may make payroll debit cards unavailable to smaller employers.

Finally, the Consumer Financial Protection Bureau (the "CFPB"), the agency charged with enforcing the EFTA, is currently addressing the appropriate regulation of prepaid cards including payroll debit cards through its own rulemaking process. Although the Department stated in its Regulatory Impact Statement that the Proposed Rule does not duplicate, overlap, or contradict federal law, we note that the CFPB's proposal addresses some of the very same topics as the Department's Proposed Rule. Regulating such items as periodic statements, transaction histories, and pre-consent disclosures, when the CFPB will be issuing a final rule on the very same items, is likely to result in differing and even conflicting rules and the need to revise processes in New York twice over a short period of time. This will be very disruptive, and potentially costly, to employers. To avoid this and the other concerns mentioned above, the APA urges the Department to defer to the CFPB's experience and expertise in this area.

5. Immediate Effective Date

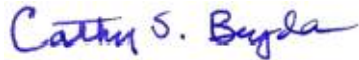
The final rule is scheduled to become effective immediately upon publication in the State Register. Because the proposed revisions are substantial, every employer with an existing payroll debit card program will be in violation of the State's Labor Law when the final rule is published. To avoid this result, sufficient implementation time should be provided to allow employers and issuers to reprogram their systems, train their HR and payroll staff, and update the required forms, procedures and contracts. Establishment of an appropriate implementation period also should take into consideration the fact that the CFPB is expected to issue its final prepaid account rule in January of 2016.

Implementation of the Proposed Rule raises some additional concerns for existing payroll debit card programs. Most importantly, it is not clear whether an employer would be required to obtain a new consent after the rule is finalized from each and every employee who currently receives his or her wages by credit to a payroll debit card account. Such a requirement would be extremely burdensome and costly, not to mention disruptive. There will always be some employees who do not respond for reasons such as travel or inattention. Disrupting an employee's selected payment method without his or her express consent could give rise to significant confusion and displeasure. To avoid this result, the final rule should make absolutely clear that employers need not obtain new consents from existing cardholders.

D. Conclusion

The APA supports the Department's efforts to establish standards for offering payroll debit cards that include important consumer protections for New York workers. We are concerned, however, that the Proposed Rule imposes a number of burdensome and costly requirements on employers and issuers that make it unlikely that they will continue to offer this beneficial payment method in the State, thereby hurting the workers it seeks to protect. To avoid this result, the APA encourages the Department to establish regulatory requirements governing payroll debit cards that faithfully adhere to the letter and spirit of New York's Labor Law.

Sincerely,



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



William Dunn, CPP
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