



American Payroll Association

Government Relations • Washington, DC

July 15, 2016

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: 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) on methods of wage payment issued by the New York State Department of Labor (Department) on June 15, 2016. At the outset, the APA is deeply concerned by the Department's confirmation that it plans to invalidate existing payment authorizations for covered employees who currently receive their wages by direct deposit or a payroll debit card. Obtaining new consents from each and every covered employee would be an extremely burdensome process that is likely to confuse and harm more workers than it benefits.

The APA also is concerned that the payroll debit card provisions of the Revised Rule continue to present a number of compliance challenges for employers. Several provisions are so vague or unclear that they fail to put employers on notice of what they must do to comply. Other provisions are overly burdensome and go well beyond providing full and free access to wages. Finally, the Revised Rule continues to make employers responsible and liable under the Labor Law for financial service functions beyond their control.

Thus, rather than protecting employees' wages, the APA is concerned that the Revised Rule will cause many employers and issuers to stop offering a very beneficial payment option that allows employees the ability to access their wages without cost in several

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.

different ways and provides increased security and convenience over paper paychecks. The APA renews its offer 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 payroll debit cards in New York.

A. APA Employer Survey

In an effort to ensure that our comments reflect the views of our members, the APA prepared a survey asking members how several of the provisions of the Revised Rule would impact their payroll operations. Responses were received from members currently conducting or planning on conducting business in New York. The survey questions tracked the language of the Revised Rule and were presented in a manner so as not to avoid influencing the answers. For each question, APA members were provided several responses to select from and were given the option of providing written comments as well.

The APA recognizes that an organization’s decision whether or not to use a particular payment method requires the consideration of many factors and the involvement of personnel from many different departments. The intent of the survey was not to attempt to determine precisely how many APA members will or will not offer payroll debit cards if the Revised Rule is finalized in its current form. To the contrary, the purpose of the survey was simply to help the APA identify which, if any, of the provisions of the Revised Rule are of concern to APA members and then to attempt to gauge the level of concern invoked by the different proposed requirements.

A total of 729 individuals responded to the survey and answered some or all of the questions. Of those responding, 160 indicated that their company currently offers payroll cards to employees in New York. Another 21 responded that their company is in the process of implementing a payroll card program in New York, and 66 indicated that they are considering offering payroll debit cards to employees in the state. Below we refer to these 247 individuals as the “Payroll Card Respondents.” Our comments below are informed by the survey responses as well as additional input from APA members.

B. Overall Impressions

Most of the APA members who responded to the survey expressed concern that the provisions of the Revised Rule were burdensome, unnecessary, and costly for both direct deposit and payroll debit cards. Many members emphasized the benefits of electronic wage payment methods over paper paychecks. They expressed concern that the Revised Rule promotes the use of paper paychecks and is a step backward in offering employees safe and convenient access to their wages.

Several of the respondents indicated that they had very high rates of direct deposit participation, some reaching 100%, and that their employees were very happy with the payment method. Many indicated that their employees like using payroll debit cards but that the Revised Rule would make it difficult to continue offering the payment method

in New York. A few members indicated that they do not like payroll debit cards and do not offer them.

C. Specific APA Member Concerns and Comments

1. The Survey Confirmed that Employers May Not Offer Payroll Cards in New York if the Proposed Rule Is Adopted Without Modification

In its [November 2015 comment letter](#), the APA expressed concern that the Revised Rule would impose burdensome and costly requirements on employers making it less likely that they would offer, or continue to offer, payroll debit cards in New York. The survey confirmed this concern.

When asked whether they were likely to continue to offer payroll debit cards if the Revised Proposal is adopted as is, only 29.7% of the Payroll Card Respondents said that they were either likely, very likely, or certain to continue to offer payroll debit cards in the State.² In contrast, 5.94% said that they would stop offering payroll debit cards in New York, and 13.37% said that they were not likely to continue to offer payroll cards in the state. Another 26.24% replied that their company would need to reconsider whether to offer payroll debit cards in the state if all of the requirements were adopted. The remaining respondents answered “other” or they did not know.

Several members commented that the Revised Rule would make it difficult or burdensome to offer payroll debit cards. A number of members offered comments similar to the following: “If the proposed rules are adopted, we will have to consider dropping the program. This would be unfortunate because our employees who participate consider this to be a benefit to them.”

² The survey asked: “If the NYSDOL adopts all of the above requirements in the final rule, how likely is it that your company will continue to offer payroll cards in New York State if they are available?”

Participants were asked to select one of the following:

- Our company is almost certain to continue to offer payroll cards in New York State, even if all of the above requirements are adopted.
- Our company is very likely to continue to offer payroll cards in New York State, even if all of the above requirements are adopted.
- Our company is likely to continue to offer payroll cards in New York State, even if all of the above requirements are adopted.
- I do not know if our company would continue to offer payroll cards in New York State if all of the above requirements are adopted.
- Our company would need to reconsider whether to continue to offer payroll cards in New York State if all of the above requirements are adopted.
- Our company is not likely to continue to offer payroll cards in New York State if all of the above requirements are adopted.
- Our company definitely will not continue to offer payroll cards in New York State if all of the above requirements are adopted.
- Other.

2. APA Members Are Alarmed by the Prospect of Having to Obtain New Electronic Pay Authorizations and Find the Requirement Extremely Burdensome and Unnecessary

In Comment 10 to the Revised Rule, the Department declared that existing consents to direct deposit and payroll debit cards will only be valid if they comply with the notice and consent requirements of the new rule. Because the Revised Rule includes a number of new requirements, it is unlikely that any existing authorizations for covered employees will remain valid. The Department indicated that employers will have six months to obtain new authorizations.

Several APA members offered comments on the need to obtain new consents. The following comment reflects the sentiment offered by many APA members:

“We pay more than 92% of our employees via direct deposit and this would create a lot of unnecessary work. People are happy with direct deposit and do not want paper checks. No one is mandated to have direct deposit in our company. It is strictly voluntary. If we have to turn off electronic payments because we do not receive a new consent, I can assure you that people will have missed mortgages, rent, bill payments, etc. because they don’t realize they have been receiving a paper check and just assumed money will be in their accounts. This will be very hard on employees as well as employers.”

Similar to the above comment, many of the comments focused on the following points:

- Employees like receiving their wages electronically;
- Obtaining new consents will impose a significant, unnecessary burden on employers and employees;
- Some employees will not return new consent forms and will be defaulted to paper paychecks against their will; and
- Invalidating existing consents would impose a significant harm on employees.

Several Payroll Card Respondents noted that employees who are defaulted to a paycheck may have insufficient funds in their account to cover automatic bill payments including a mortgage or car payment. Moreover, they may be reverted to paychecks permanently if the employer decides obtaining new consent or complying with the new rules is too burdensome. For example, one APA member stated: “We would need to add another person to manage consent forms. This is a non-value-added burden on our company and it would be easier to just stop offering the payroll cards for those employees who are unbanked.”

One APA member provided the following example of how requiring new consents would impact her organization:

“In our business (higher education), we employ thousands of students over the course of a calendar year. Many of them work for only a few months

before leaving the university to go on to jobs or in many cases, to go to their home country, typically for us, India, China, South Korea. Students, in general, are so busy they very often don't think about their final paycheck. For those that have direct deposit, this is not something they HAVE to think about. They just know that on payday, their money will be in the bank.

“To require new direct deposit authorization would be administratively burdensome with such a large population simply because students like to do things like this ‘once and done’! For those students who go home, if we had to issue paper checks, when they were used to getting direct deposit, it would surely increase our escheatment process as many of these checks would go uncashed.”

3. APA Members Are Concerned About Requirements Over Which They Have Little or No Control

The Payroll Card Respondents expressed significant concern that the Revised Rule imposes a number of compliance obligations on employers over which they have little or no control. The potential for civil and criminal liability under the Labor Law for minor violations outside the employer's control creates a significant disincentive to offering payroll debit cards.³

a. Unlimited Free Withdrawals at Local ATMs

Proposed section 192-2.3(b) makes employers that offer payroll cards responsible for ensuring that there is at least one ATM that provides unlimited free withdrawals within a reasonable travel distance from each participating employee's work location or home.⁴

³ 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 who fails to pay wages due may be held liable for liquidated damages of no more than 100% of the amount of the total amount of wages found to be due. *Id.* at §§ 198(1-a) (1). Willful and repeat violations will be subject to liquidated damages not to exceed double the total amount of wages due at § 218(1). If the violation is for a reason other than failure to pay wages, the Commissioner shall 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(1). 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 felonies, each punishable by a fine of \$500 to \$20,000, imprisonment for not more than 1 year and a day, or both. *Id.*

⁴ The survey notified participants that “The proposed rule would make employers that offer payroll cards to employees responsible for ensuring that there is at least one ATM that provides the employee with unlimited withdrawals without fees within a reasonable travel distance from the employee's work location or home.”

Participants were asked to select one of the following.

- This requirement would not present a problem for our company.

This provision caused more concern among the Payroll Card Respondents than any other provision of the Revised Rule except the requirement to obtain new employee consent. Indeed, 39.02% of the Payroll Card Respondents stated that this requirement would cause their company to seriously consider whether they should offer or continue to offer payroll debit cards in the state. Another 12.2% of the Payroll Card Respondents answered that their company would stop offering payroll cards in the State of New York if this provision is adopted.

Payroll Card Respondents were concerned that they have no control over ATM locations and that they would have to rely on their payroll card vendor for compliance. (“We would need to rely on the third-party card provider to keep us in compliance which is risky”). In the following comments, they express that it would be difficult to comply with the local access requirement:

“We have single employees in remote locations. This could be very challenging to find ATMs within a reasonable travel distance from the employee’s work or home location.”

“We have no way to verify this. We have employees that work from home in remote locations, and that would make it impossible for the employees to choose a payroll card.”

“It would be difficult to comply with as the employers have no control over ATMs nor can the employer guarantee that the ATM would be available for use.”

In addition to the local access requirement, Payroll Card Respondents were concerned about the need to provide unlimited free ATM withdrawals. Respondents commented that this requirement is burdensome (“it makes the employer a banking agency”) and difficult to satisfy (“Almost all ATMs have a daily withdrawal limit”). They also observed that ATM withdrawals are not necessary for accessing full wages. Many respondents identified other ways for employees to access their wages, including over-the-counter bank teller transactions at financial institutions that are a member of the payment brand (i.e., Visa or MasterCard).

b. Thirty Days Advance Notice of Change in Terms

Proposed Section 192-2.3(g) requires employers to provide 30 days’ advance notice of any changes in terms and conditions of the payroll card account.⁵ Again, this provision

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- This requirement is burdensome, but our company would find a way to comply with it.
 - The requirement would cause our company to seriously consider whether we should offer or continue to offer payroll cards to employees in New York State.
 - Our Company would stop offering payroll cards in New York State if this provision is adopted.
 - Other.

⁵ The survey notified participants that: The proposed rule would require employers to provide employees who use payroll cards with at least 30 days advance written notice of any changes in the terms and conditions of the payroll card, including any changes in the list of itemized fees. The notice must be

is of significant concern to APA members because they must rely entirely on the vendor for compliance. Nearly a third (31.19%) of the Payroll Card Respondents stated that this requirement would cause their company to seriously consider whether to offer or continue to offer payroll debit cards in New York, and another 6.93% suggested that this provision alone would cause their company to stop offering payroll debit cards in the state.

The vendor, not the employer, maintains the terms and conditions of the payroll debit card account. As such, employers must rely entirely on the vendor for compliance. Employers should not be held responsible under the Labor Law for banking processes over which they have little or no control.

Members also found the language requirements of section 192-2.3 to be troubling both because they are burdensome and because it is not clear to them what is required to comply. For example, one member asked if the initial notice and consent is provided using one of the Department's templates (e.g., Russian), must the change in terms notice be provided in the same language or may it be provided in a language the employee understands (English)? Requiring employers and providers to hire translators to prepare the change in terms notices, where no templates are available, would be a tremendous burden.

c. Fee Prohibitions

The APA's survey did not solicit member input on the Revised Rule's fee prohibitions outside the issue of free ATM withdrawals. However, APA members have expressed concern that the fee prohibitions may make it difficult for providers to issue payroll debit cards in the state. In addition, APA members expressed concern that they have no control over what fees are charged by providers outside their agreement with the provider, and must rely entirely on the provider for compliance. Again, exposure to liability based on conduct of a third party will cause some employers to decide not to offer payroll debit cards in New York to the detriment of their workers.

provided in the employee's primary language or in the language the employee understands. Federal law requires the issuer to provide 21 days advance notice of certain changes that would adversely impact the cardholder.

Participants were asked to select one of the following:

- The requirement would not present a problem for our company.
- The requirement is burdensome, but our company would find a way to comply with it.
- The requirement would cause our company to seriously consider whether we should offer or continue to offer payroll cards to employees in New York State.
- Our company would stop offering payroll cards in New York State if this provision is adopted.
- Other.

4. APA Members View the Seven-Day Cooling Off Period as a Burden, Denying Employee Choice, and Limiting Card Functionality⁶

Proposed section 192-2.3(a)(2) requires employers to wait seven business days after obtaining employee consent before paying wages using a payroll debit card. Nearly one-quarter (22.9%) of the Payroll Card Responders indicated that this requirement would cause their company to seriously consider whether to offer or continue to offer payroll debit cards in New York. Another 8.88% said this requirement would cause them to stop offering payroll cards in the state. Only 29.91% said that this requirement would not present a problem for their company.

Concerns expressed about the seven-day cooling off periods were three-fold. First, some members stated that keeping track of the authorization forms and ensuring they are not inadvertently processed would present an administrative burden on the company. This is particularly true for employers who utilize employee self-service systems. Self-service allows employees to independently enter or change their payment selection at any time. Several members commented that the seven-day cooling off period would require them to develop an entirely new system that identifies when an employee is establishing payment to a payroll debit card, as opposed to direct deposit, and then stop the payment when payroll is run during the seven-day period. One APA member who utilizes employee self-service systems stated, “We will need to completely change the way we process payroll cards due to the seven-day waiting period.” Another member agreed, “The 7-day rule will have a negative impact on us because our employees can update their own accounts using self-service. We would have to find a way to monitor when the account is added and when the payroll is run.”

Second, APA members expressed frustration that the seven-day cooling off period unnecessarily denies an employee the ability to make his or her own payment decision. One member stated, “This is a disservice to our employees. It should be the employee’s choice, not the state’s.” Another exclaimed “We are attempting to serve our employees ... this hinders our efforts.”

Finally, APA members expressed concern that the seven-day cooling off period eliminates an important function and use of payroll debit cards, namely, the ability to

⁶The survey notified survey participants that: Under the proposed rule, employers would be required to wait seven business days after providing the required notice and obtaining an employee’s consent before taking any action to pay the employee using a payroll debit card. Many, if not most, employees would need to receive a paper paycheck for at least the first pay period.

Participants were asked to select one of the following.

- The requirement would not present a problem for our company.
- The requirement is burdensome, but our company would find a way to comply with it.
- The requirement would cause our company to seriously consider whether we could offer or continue to offer payroll cards to employees in New York State.
- Our company would stop offering payroll cards in New York State if this provision is adopted.
- Other.

use the card to make immediate payments upon request and in times of emergency. Many APA members have used payroll debit cards to distribute wages to employees after 9/11, hurricanes, snow storms, and tornados.

In addition to disaster relief, APA members reported that employees sometimes ask for off-cycle payments to be made by card so that the employee can access the funds more quickly. Until same-day ACH becomes a reality, payroll cards offer a quicker and no-cost method of getting wages to all employees in these situations.

5. APA Members Are Concerned That the Notice and Consent Requirements Are So Vague That They Fail to Put Employers on Notice of What Is Required

The Revised Rule requires employers to provide their employees with notice of specified information, and obtain the employee's consent, when paying wages by direct deposit or a payroll debit card. The notice and consent must be provided in English and in the primary language of the employee when a template notice and consent in such language is available.⁷

More than a quarter (28.5%) of the Payroll Card Respondents stated that this requirement would cause their company to seriously consider whether they should offer or continue to offer payroll cards to employees in New York. Another 3.74% said that their company would stop offering payroll cards in New York if this requirement is adopted.

Payroll Card Respondents expressed concern that this requirement is burdensome and vague. Despite the Department's insistence in Comment 8 to the contrary, the Revised Rule does not itself address what happens when there is no template available in the employee's primary language. Nor does it address what language must be used when the employer prepares its own notice and consent forms. While this information is provided in Comment 8, it appears to have been removed from the text of the Rule itself that appeared in the October 28, 2015, version of the proposed rule.

⁷ The survey notified participants that "The proposed rule would require that the disclosures listed in Question 3 be provided in the employee's primary language, a language the employee understands, or using templates made available by the NYSDOL. The NYSDOL intends to make templates available in at least 11 foreign languages. If an employer elects to use the templates, and none exist that the employee understands, the employer could provide the employee with the English template. Consents that do not comply with the language requirement will not be valid.

Participants were asked to select one of the following:

- The requirement would not present a problem for our company.
- The requirement is burdensome, but our company would find a way to comply with it.
- This requirement would cause our company to seriously consider whether we should offer or continue to offer payroll debit cards to employees in New York State.
- Our company would stop offering payroll cards in New York State if the provision is adopted.
- Other.

One Payroll Card Respondent noted that many employers use a NACHA-approved direct deposit form, and stated that it is not clear whether an employer may attach its own direct deposit form to the template and, if so, whether the enrollment form must be provided in the same language as the template. The Respondent wanted to know whether all documents accompanying the template need to be in the same language. When the Consumer Financial Protection Bureau issues its predislosure consent requirements, which is expected to be this summer, can those be provided along with or in lieu of the template?

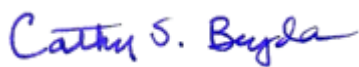
As mentioned previously, another APA member asked whether the change in terms notice must be provided in the same language as the initial notice and consent. With respect to the content of the required notice, the Revised Rule is not clear about what is meant by the statement that the employee may not be charged “any fees for services that are necessary for the employee to access his or her wages in full?” APA members expressed concern that this statement is likely to confuse employees and result in unnecessary disputes. They questioned how this requirement applies to direct deposit. Also, would a statement notifying employees that direct deposit and payroll debit cards “are voluntary” satisfy the requirement that the notice include “a statement that the employer may not require the employee to access wages by payroll debit card or by direct deposit?”

Finally, proposed section 192-2.2(b) requires employers to maintain an employee’s consent for direct deposit for six years after the last payment of wages by direct deposit. Is there a similar requirement for payroll debit cards? The Revised Rule does not appear to treat payroll debit cards as a form of direct deposit (see comment 9).

D. Conclusion

The APA respectfully requests that the Department reconsider its position to invalidate existing payment authorizations. As an alternative, notice to employees about the new rule with a reminder that they are allowed to change their payment method at any time would be far less burdensome on employers and employees. While the APA supports the Department’s efforts to establish standards for offering payroll debit cards that include important consumer protections for workers, we remain concerned that the Revised Rule goes too far and raises questions about whether employers and issuers will continue to offer payroll debit cards in New York. 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



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