

CFPB Bulletin Provides Useful Paycards Guidance



BY CATHY S. BEYDA, ESQ.

On September 12, the Consumer Financial Protection Bureau (CFPB) issued a bulletin declaring that a federal banking regulation known as Regulation E prohibits employers from requiring employees to receive their wages on a payroll card. The bulletin further advised that the CFPB has certain enforcement authority over employers and that, in exercising this authority, it intends to identify and stop violations. Although the CFPB emphasized that the bulletin simply “reiterates” existing law, its publication has given rise to confusion and concern among employers.

Many APA members have asked whether, as a result of the

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bulletin, they now must offer their employees a paper paycheck in states where a purely electronic wage payment was thought to be permitted. The answer to this question is no.

As CFPB Director Richard Cordray stated in a letter to several U.S. senators issued on the same day as the bulletin: “Regulation E does not require that employers offer employees the option of receiving wages via paper check. Permissible alternative wage payment method(s) are governed by state law, but may include direct deposit to an account of the employee’s choosing, a paper check, cash or other evidence of indebtedness.” Thus, APA members who offer their employees the choice between direct deposit to a financial institution designated by the employee and payroll cards, in accordance with applicable state law, do not need to worry that this choice violates Regulation E.

The CFPB and Regulation E

Two other questions prompted by the bulletin are, “What is the CFPB, and why is it telling me how to pay my employees?” The CFPB is the primary federal regulator of consumer financial

issues. The Bureau was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and has assumed responsibility over several federal financial consumer laws and regulations, including Regulation E.

Regulation E implements the federal Electronic Fund Transfer Act (EFTA) and provides a number of important consumer protections to consumers who use electronic fund transfer (EFT) services. Regulation E has covered traditional direct deposit for many years and, in 2006, was amended to expressly cover payroll card accounts. The regulation defines “payroll card account” as “an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer’s wages, salary or other employee compensation (such as commissions) are made on a recurring basis.”

While Regulation E primarily governs the conduct of financial institutions, it includes a provision that has been interpreted as regulating employer conduct. This provision, known as the compulsory use provision, provides:

No financial institution *or other person* may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment or receipt of a government benefit 12 C.F.R. §1005.10(e)(2)(emphasis added).

The compulsory use provision has long been interpreted to mean that employers may not require their employees to receive direct deposit to a particular financial institution, but instead must allow employees to choose the institution that will receive the wage deposit. When Regulation E was extended to payroll card accounts, the Federal Reserve Board (then responsible for enforcing its provisions), similarly advised that employers may give their employees the choice between direct deposit into a financial institution of their choosing and payment into a payroll card account without violating the compulsory use provision. The payroll card account simply becomes another account from which the employee may choose. The CFPB’s recent bulletin simply restates this position.

Why the Bulletin Is Important

The CFPB’s bulletin is important for at least two reasons. First, it is not at all intuitive to employers that they must look to federal banking law when deciding how to pay their employees. Even the principal federal wage and hour law, the Fair Labor Standards Act, only tangentially addresses permissible methods of wage payment. As a result, employers often look only to the state wage and hour laws when deciding how to pay their employees.

Some states don’t regulate the method of wage payment, however. These include Alabama, Louisiana, and Mississippi. Moreover, the wage payment statutes and regulations in a few other states could be interpreted as allowing employers to pay their employees using payroll cards only. These states include Colorado, Delaware, and Utah. Thus, even the best-intentioned employers could conclude, particularly in these states, that they may lawfully pay their employees using payroll cards without offering any other payment options. Putting employers on notice of Regulation E’s provisions, as the bulletin does, helps employers avoid this mistake.

“Regulation E does not require that employers offer employees the option of receiving wages via paper check.” — CFPB Director Richard Cordray

The second reason the bulletin is important is that it could help with legislative initiatives addressing payroll cards and hopefully calm some of the negative (and inaccurate) accounts relating to payroll cards that have appeared in the media. A common assertion made by policymakers and reporters is that payroll cards are unregulated, leaving workers with little or no protections. The CFPB’s bulletin makes clear that this is not the case. Not only does Regulation E require employers to provide their employees with some payment choice, but it requires financial institutions that issue payroll cards to provide a number of consumer protections as well. These protections include:

- initial disclosures
- limited liability for unauthorized transfers
- change in term notices
- periodic statements
- error notification
- overdraft protection

Thus, any claim that payroll cards are unregulated can easily be refuted by pointing to the bulletin.

Conclusion

All in all, the CFPB’s bulletin is a positive development. It reminds employers that they must offer at least one payment method in addition to payroll cards. State law continues to determine whether a paper paycheck is required and sets forth the conditions that must be satisfied before electronic payment methods may be used. □