CFPB Bulletin Provides Useful Paycards Guidance

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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 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.

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.