



PAYCARDS

in the

Spotlight

BY JENNIFER RUSIE

Know the Regulations, Weigh Your Risk

Paycards are having a moment: Dozens of recent articles in publications such as *The New York Times* and *USA Today* have highlighted the growing trend of employers paying wages to their employees via a debit card. Last July, a group of U.S. senators wrote a highly publicized letter to the Consumer Financial Protection Bureau and Department of Labor seeking clarification on federal law regarding paycards. We also have begun to see the first few lawsuits accusing employers of violating the law for paying wages in this manner.

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In light of this publicity, these new lawsuits and the potential for more legal scrutiny, you may be asking yourself, “Should we pay employees with paycards?” In order to answer this question, you must consider both federal and state law and balance the risks that could be lurking out there.

Federal Laws Regarding Paycards

The only federal regulatory schemes that explicitly deals with paycards is Regulation E of the Electronic Fund Transfer Act, although innovative plaintiffs are arguing that paycard fees may reduce their wages below minimum wage and therefore run afoul of the Fair Labor Standards Act (FLSA).

However, the reaches of

Regulation E are somewhat murky to some. To alleviate any confusion on this issue, that letter written by the group of U.S. senators expressed [their] “concern about the fees and practices associated with prepaid ‘paycards’ and urged the Consumer Financial Protection Bureau and Department of Labor to take swift action to protect American workers.” The senators further requested that the agencies take a closer look at whether workers adequately understand the fees associated with paycards, the effect these fees may have on employee income in the aggregate, and whether fees for ATM use, balance inquiries, point of sale purchases, overdrafts, or inactivity violate

Regulation E or the FLSA.

Although not explicitly in response to the senators’ letter, on September 12, 2013, the Consumer Financial Protection Bureau issued a bulletin to “reiterate” the application of Regulation E to paycards. This bulletin does not change the current state of federal law regarding paycards, and it does not have any effect on state laws. However, it does let the consuming public know that the Bureau is very interested in paycards.

But, while we are on the topic, let’s look at the question the bulletin purports to answer—what effect does Regulation E have on paycards? Regulation E imposes requirements on financial institutions (not employers) offering payroll card accounts, which include the following:

- **Disclosures**—Regulation E provides that paycard holders are entitled to receive certain disclosures, including information regarding fees they may incur for using the paycard, limitations on liability, the types of transfers they may make with the paycard, and error resolution.
- **Access to account history**—Regulation E states that a paycard issuer must provide periodic statements regarding the paycard account. Alternatively, the paycard issuer may: (1) make the account balance available by telephone, (2) make a 60-day history available via the Internet, and (3) upon an oral or written request, promptly provide a written history of the account transactions for at least the previous 60 days.
- **Limited liability**—Regulation E’s limited liability exceptions apply to paycards, which means that the paycard holder’s liability



for unauthorized transfers will be limited, provided the card holder reports the unauthorized transfer in a timely manner.

- **Error resolution rights**—The paycard issuer must respond to a report of errors from the paycard holder if it is received in a timely manner.

So, does any part of this bulletin apply specifically to employers? Yes. The Consumer Financial Protection Bureau bulletin reiterates that Regulation E states that no “financial institution or other person” (i.e., employer) can mandate that an employee receive direct deposit into an account at a particular institution (i.e., a specific paycard). In other words, Regulation E prohibits employers from mandating that employees receive wages via a paycard of the employer’s choosing with no other options available. These options could be direct deposit, check, cash, or any combination of the three.

State Laws Regarding Paycards

Importantly, federal law is not the only consideration—employers must consider the state law(s) where the employees are located, as the law in this area is rapidly evolving. While a number of states expressly permit the use of paycards, it is important to read the fine print on these regulations and the paycard paperwork. Some pitfalls include:

- Some states allow employers to mandate paycards (usually as an alternative to direct deposit), while others only permit the use of paycards if the employee voluntarily (and knowingly) elects the option.
- Some states require that employees be allowed a specific number of free withdrawals from ATMs, while others only require that an

Paycards are a great complement to direct deposit

employee must be able to obtain the full amount of wages on the card once without fees. This can be accomplished through a courtesy check or a cash withdrawal from a bank teller.

- Some states require that the “free” options available to employees be located within a specific or “reasonable” distance from the employee. Others do not impose such obligations.

Paycard Litigation and Attorney General Activity

To date, there have been only a handful of lawsuits filed regarding the use of paycards. Unfortunately, they are in the early stages so it is unclear how they will shake out. The first nationally publicized case, *Gunshannon v. Albert/Carol Mueller T-A McDonalds*, pending in state court in Pennsylvania, is a class action based solely on Pennsylvania state law. In this lawsuit, the lead plaintiff alleges that a McDonald’s franchisee required its employees to be paid wages exclusively through a paycard, and that the employees could not obtain access to their wages without incurring fees. The complaint further alleges that this payment arrangement ran afoul of Pennsylvania’s wage payment statute,

which does not explicitly permit payment of wages via paycard. While the allegations that the employer mandated payment via paycard with no other options appear to state a claim for violation of Regulation E, the lawsuit does not include such a claim. However, this omission may have been a strategic attempt to keep the case in state court. The outcome of this case could shed some light on how courts will interpret state wage payment statutes that do not explicitly permit the use of paycards, but unfortunately, it will not give us any insight into the application of Regulation E.

Another case to watch is *Lapan v. PVH Corp.*, a class action pending in federal court in northern California, which contains allegations of violations of both federal law (FLSA) and California state law. The plaintiffs in this case have claimed that the defendant offered two payment options—direct deposit or paycard, and that because they did not have checking accounts, they “were given no choice but to be paid through defendant’s payroll card program.” The plaintiffs have claimed, among other things, that because the paycard at issue charged monthly maintenance fees, fees for all ATM transactions, and other fees, they were paid less than the federal and California statutory minimum wage and overtime rate, and that the defendant violated other California wage payment laws. Notably, this case did not allege violations of Regulation E, likely because the employees were given more than one option for payment of their wages. The minimum wage element of this case is a key to future lawsuits, as it will provide guidance on whether the use of paycards can violate the FLSA.



Do's and Don'ts

In addition to lawsuits, some state attorneys general have begun investigations of employers in earnest. Leading this charge is the New York Attorney General, who has very publicly asked approximately 20 companies to disclose their paycard practices, and who has launched numerous investigations into employers utilizing these cards. Other attorneys general are paying close attention, and some have begun investigations of their own.

It is clear that paycards are not going away anytime soon, and neither are the agencies that regulate them. That said, it is in the best interest of employers to dot their "I's" and cross their "T's" when dealing with paycards to avoid being targeted by government agencies or possibly defending a class action. Here are some do's and don'ts that should keep you on the right side of the law.

Don't: Accept a vendor's claim

that it must charge fees for all transactions.

Do: Negotiate the terms of paycards with paycard vendors to ensure that employees have access to 100% of their wages without fees at least once. If a vendor refuses, find another vendor.

Don't: Forget that ATMs do not dispense change or denominations other than \$20, or that some ATMs have daily withdrawal limits, which would impede employees from obtaining their full wage amounts.

Do: Obtain free options, such as convenience checks or bank teller withdrawals, which will permit employees to obtain 100% of their wages without a fee.

Don't: Assume that the free ATM or bank options are easily accessible. A free ATM that is only located in other states may as well not exist.

Do: Ensure that the free options are conveniently located.

Don't: Mandate payment of wages via paycard.

Do: Offer at least one other option—the type of other option depends on the jurisdiction(s) where you operate. It is OK to promote paycards—just don't force them on unknowing or unwilling employees.

Don't: Impose paycards on employees without their knowledge or consent or bury paycard information in paperwork.

Do: Inform employees of their options and, depending on your jurisdiction, obtain knowing and voluntary (and if required, opt-in) consent.

Don't: Forget that employees should be able to access their account histories and that agencies frown on inactivity fees and commissions for enrolling employees in paycard programs.

Do: Explore the options the paycard vendors have in these areas, and decline any commissions. Perceived "kickbacks" from paycard vendors are a red flag for attorneys general, and also violate many wage payment statutes.

Don't: Assume franchisees are following the law in this area.

Do: Monitor the payroll practices of franchisees.

Don't: Panic!

Do: Seek assistance if you have any questions. Paycards are explicitly permitted in many states, and are impliedly permitted in most others. You just need to know the legal parameters.

At the end of the day, paycards are a great complement to direct deposit—a way for employers to reduce the costs associated with paper paychecks while still serving their unbanked employees. With a little guidance and information, everyone can win with paycards. □