



PAYROLL CURRENTLY

The Compliance Publication of the American Payroll Association

Inside Washington

November 6,
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New York DOL Releases Revised Proposed Rules for Payroll Cards and Wage Payments

The New York Department of Labor has released revised proposed rules regulating wage payments by payroll card, direct deposit, and paper checks [LAB-21-15-00009-RP, revising Title 12 NYCRR, Part 192, <http://docs.dos.ny.gov/info/register/2015/october28/pdf/rulemaking.pdf>]. This is the second proposed rule New York has issued. Comments submitted after the original release resulted in so many changes that the Department felt a second release, with a subsequent 30-day comment period, was warranted before proceeding to a final rule. The proposed rules were released on October 28, and comments are presumed to be due on November 27, which falls the day after Thanksgiving. The rule will go into effect six months after the final rule is approved.

Onerous provisions

Many of the New York provisions are similar to provisions currently in place in other states. However, the state also seeks to provide consumer protections significantly more stringent than any other state currently does.

New York will not be confused with any of the 25 so-called green states, in which employers may make all wage payments electronically, without the need to offer paper checks. Not only must employers in New York obtain written consent from employees before paying wages on a payroll debit card, the consent must be obtained seven days prior to payment. As APA pointed out in written comments to the New York Department of Labor and in a face-to-face meeting with the deputy secretary of labor, that requirement will almost certainly require employers to delay activating the card for an entire pay period. Even employees who not only consent but actually request payroll cards will need to wait seven days before the cards are activated (see “Inside Washington” for August).

Employers in New York will also need to provide employees with free ATM access. This requirement is far beyond what is required by any other state. Specifically, the rules say that the employer will need to provide access to one or more ATMs that offer withdrawals at no cost to the employee. Regardless of the number of free withdrawals offered to employees, they will not be able to withdraw their entire pay, down to the penny, from an ATM. In addition, employers will also need to provide employees with a list of ATMs that are near the place of employment.

From a wage-hour perspective, it is vital that employees have access to their entire pay. Payroll card companies remain in compliance primarily by offering cardholders the ability to cash out their cards at a bank through an over-the-counter transaction. They may also offer convenience checks to the employee, which allow cardholders to write paper checks against the payroll card account. Cardholders must receive authorization from the card company for each check they write to ensure that they do not take the account into a negative balance.



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Driven by the need to comply with federal and state wage-hour rules, payroll card companies routinely provide cardholders the ability to cash out their entire wages for free each pay period. Beyond that, payroll cards might have a limit on the amount that can be withdrawn each day. New York's proposed rules would require that any such caps be removed so that cardholders can withdraw the entire balance on the card, for free.

Currently, card providers might provide cardholders free access to an entire network of ATMs. But that benefit is generally dependent upon the number of employees from a particular corporate client who enroll in the program. A smaller employer, or a large employer with few enrolled workers, is less likely to be able to offer that benefit, right now.

The proposed rules include a long list of fees that cannot be charged to employees. These prohibitions include a number of fees that are typically not charged under a payroll card program, such as loading fees or fees for point-of-sale purchases. Beyond the usual suspects, card providers will not be able to charge for overdrafts or declined transactions, for replacement cards, and for account inactivity.

Direct deposit

The rules for paying employees by direct deposit have not changed substantially. Employees must provide written consent, and they must be able to choose the financial institution into which the wages are deposited. The proposed rule would add that employees must provide their consent in writing, and employers must provide employees with a copy of the consent. Written consent may be obtained electronically.

Check payments

In many states, the guarantee that an employee has the ability to access his or her entire wages, for free, each pay period is a significant selling point for payroll debit cards. The overwhelming majority of states do not require employers to provide a means by which employees can cash out their paychecks for free. New York aims to be counted among the select few states that do require it.

The proposed rules require employers to provide at least one means by which employees can either cash out their checks or deposit them into "a financial institution or other establishment," for free. The service must be "reasonably accessible" to the place of employment. Further, employers may not impose any fee related to the paychecks, including fees to replace lost or stolen checks.

These rules regarding checks are not actually new. They have been covered in opinion letters issued by the state's Department of Labor. "The proposed rule codifies existing requirements for paychecks," the department said, "providing clarity to the regulated community on the existing requirements."

APA to comment

The APA, through the Government Relations Task Force Subcommittee on Paycards, plans to submit comments on the revised proposed rules. If you have suggestions for the comments, the Subcommittee would love to hear from you. Because of the short comment period, we need to hear from you by Friday, November 20. Please



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email Bill Dunn, CPP, APA Director of Government Relations, at bdunn@americanpayroll.org, with your suggestions.