

**New York State Department of Labor Issues
Proposed Rules for Payroll Debit Cards**

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By Dean L. Silverberg, Jeffrey H. Ruzal, Nancy L. Gunzenhauser, and Maxine Adams

The New York State Department of Labor (“NYSDOL”) recently announced that it had published [proposed regulations](#) (“Proposed Regulations”) governing employers’ use of payroll debit cards as a permissible method of wage payment. These Proposed Regulations follow similar attempts earlier this year by New York Attorney General Eric Schneiderman and legislators to regulate the use of payroll debit cards for the payment of wages.

Prelude to the Proposed Regulations

According to a 2013 research report by *Forbes*, U.S. employers pay an estimated 5.8 million workers through the use of payroll debit cards. In New York State, an estimated 13,000 businesses pay wages to approximately 200,000 workers through the use of payroll debit cards. The growing use of payroll debit cards is attributed to the significant cost savings that an employer may achieve by paying employees with debit cards instead of paper checks. According to Visa Inc., an employer spends approximately \$0.35 making a deposit on an employee’s payroll debit card, while the same transaction costs as much as \$2.00 if the employer uses a paper check. Moreover, payroll debit cards allow employees without bank accounts to receive quick access to their funds.

After getting complaints from employees about receiving their wages through payroll debit cards, the New York State Attorney General’s office began reviewing the use of payroll debit cards within New York State. Following this review, the Attorney General’s office published [a report](#) in 2014 (“Report”) discussing:

- the accessibility of wages through the use of payroll debit cards without incurring fees,
- the amount of information employers provide to employees regarding where to obtain wages from the payroll debit card without incurring a fee, and
- the ability of employees to obtain wages through other forms of payment.

Further, the Report provided various recommendations for reforms to address the specific concerns highlighted by the Report.¹ As a result, the Attorney General introduced [a bill](#) in February of this year addressing many of these concerns.

The Proposed Regulation's Requirements

With the Attorney General's legislation still pending, the NYSDOL announced the Proposed Regulations related to payroll debit cards, which will take effect following a notice and comment period, which is scheduled to end on July 31, 2015. These proposed changes create new requirements for employers that wish to use payroll debit cards to pay employees. The Proposed Regulations would require an employer to obtain "informed consent" from all employees before establishing payroll debit cards as a form of payment.² In particular, consent must be obtained without "intimidation, coercion, or fear of adverse action by the employer for refusal to accept the payroll debit card or payroll debit card account."

The employer must provide employees with certain information in writing *at least* seven days prior to obtaining consent. This written notice must contain a description of all options for receiving wages³ and a statement regarding an employee's rights related to obtaining wages without incurring fees. Employers also would not be able to require employees to participate in the payroll debit card program as a condition of hire or of continued employment.

Once an employer has provided sufficient notice and obtained consent, the Proposed Regulations would additionally require the employer to ensure that its employees will not be charged, directly or indirectly, any fees in order to withdraw wages from the account. This restriction includes any fees related to overdraft, shortage, low balance status, account inactivity, maintenance, and customer service. If the issuers of the

¹ The Report recommended that any legislation regulating payroll debit cards should include the following:

- informed consent before an employer can pay wages using a payroll debit card;
- sufficient notice of the terms and conditions of the payroll debit card;
- the requirement that the employer select a vendor that:
 - provides free access to wages, with at least one free network of ATMs and a limited number of out-of-network ATMs to access wages;
 - does not charge overdraft or negative balance fees or fees for common transactions, such as ATM balance inquiries and signature credit transactions; and
 - provides free customer service;
- sufficient access to account information;
- the requirement that, at termination of employment, employers provide the cardholder employees with written notice incorporating the terms and conditions of the card;
- prohibitions against allowing employers to receive any portion of fees collected by the vendor associated with payroll debit cards; and
- the requirement that employers respect employee privacy.

² If the employee is covered under a valid collective bargaining agreement that "expressly provides the method or methods by which wages may be paid to employees," the Proposed Regulations also require that the employer obtain the approval of the union before paying employees by payroll cards.

³ These options include paper check, direct deposit, and payroll debit card.

payroll debit card change the terms or conditions, an employer must provide additional notice to employees and potentially repay any fees if adequate notice is not provided.

What Employers Should Do Now

Employers that currently use, or want to start using, payroll debit cards for employees should review their practices to ensure compliance with federal⁴ and state⁵ payroll debit card regulations.

Although the proposed regulations are still in the notice and rulemaking phase, once the Proposed Regulations take effect, employers in New York State should:

- review any fees associated with the payroll debits cards to ensure that employees will not incur fees when accessing wages,
- review the payroll debit card network to ensure that employees will have access to wages through in-network ATMs and adequate access to customer service,
- prepare a compliant notice to provide to employees regarding payroll debit cards, and
- train human resources personnel and payroll departments to provide the proper notices and obtain the proper informed consent before beginning payment through payroll debit cards.

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For more information about this Advisory, please contact:

Dean L. Silverberg
New York
212-351-4642
dsilverberg@ebglaw.com

Jeffrey H. Ruzal
New York
212-351-3762
jruzal@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Maxine Adams
New York
212-351-3783
madams@ebglaw.com

⁴ The Consumer Financial Protection Bureau (“CFPB”) published a bulletin in September 2013 to remind employers that choose to utilize payroll cards of the requirements set forth in the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*, and Regulation E, 12 C.F.R. § 1005 *et seq.* The CFPB noted that employers cannot require their employees to receive wages on a payroll card. Additionally, state laws generally govern which alternative payment options employers are required to offer and specific guidance may be promulgated for the use of payroll cards, like the New York Proposed Regulations.

⁵ Among the states that have passed legislation regulating payroll debit cards are Hawaii, Illinois, and Nebraska. However, many states currently have pending legislation regarding payroll debit cards. Additionally, in others, state agencies have been promulgating regulations to provide guidance for employers utilizing payroll cards.

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