



NEW YORK PROPOSES ADDITIONAL REGULATIONS CONCERNING HOW EMPLOYERS CAN PAY EMPLOYEES

By Carolyn D. Richmond, Glenn S. Grindlinger and Jason B. Jendrewski

Employers may pay employees their wages in several different ways. For many employers, long gone are the days where they physically distribute paychecks to all of their employees at the end of the week. Given this reality, the New York State Department of Labor has been engaged in rulemaking to create specific guidelines for how employers can pay their employees.

On June 15, 2016, the New York State Department of Labor published new proposed regulations setting forth specific requirements that employers must follow for each of the following permissible methods of wage payment – cash, check, direct deposit and payroll debit card. In short, if an employer pays its employees by any method other than cash, then there are specific requirements with which an employer must comply.

We discuss each of the noncash wage payment methods below in light of the proposed regulations. Unless further modified by the New York State Department of Labor, the regulations are expected to go into effect in the first half of 2017.

Requirements for the Payment of Wages by Check

Employers paying wages by check do not necessarily have to make any changes in response to the proposed regulations, as they essentially

codify existing requirements. When paying wages by check, an employer must ensure that: (a) the check is a negotiable instrument; and (b) the employer does not impose any fees in connection with the use of checks for the payment of wages, including fees for the replacement of lost or stolen checks.

General Requirements for the Payment of Wages by Direct Deposit or Payroll Debit Card

Employers paying wages by direct deposit or payroll debit card must be mindful of the notice and consent requirements set forth in the proposed regulations. Implicit in the proposed regulations is the fact that employees have the freedom to choose if they want to be paid by these methods.

Notice Requirements

An employer paying wages by direct deposit or payroll debit card must provide its employee with a written notice containing:

1. A description (in plain language) of all options for receiving wages;
2. A statement that the employer may not require the employee to accept wages by payroll debit card or by direct deposit;
3. A statement that the employee may not be charged any fees for services that are necessary

for the employee to access his or her wages in full; and

4. A list of locations within reasonable proximity to the employees' residence or worksite where employees can access and withdraw their wages at no charge to them (if offering employees the option of payment by payroll debit card).

Consent Requirements

In addition to providing the required written notice, an employer paying wages by direct deposit or payroll debit card must obtain the employee's consent in writing. The required informed consent must be obtained without intimidation, coercion or fear of adverse action for refusing to accept payment of wages by either of those methods. An employee must be permitted to withdraw his or her consent at any time; however, the employer is afforded a reasonable period of time (up to two full pay periods) to finalize the change to the employee's payment of wages.

Language Requirement and Electronic Option

The required notice and consent must be provided in English as well as each employee's primary language, provided that the Commissioner of Labor makes a template notice and consent available in that language. Employers should be aware that the notice and consent may be provided and obtained electronically. However, the employee must have the ability to view and print the notice and consent at work at no cost to the employee. The employee must be notified of his or her right to print the materials through the electronic process used by the employer.

Prohibited Practices

Payment of wages by either of these methods cannot be a condition of hire or continued employment. Accordingly, the revised proposed regulations prohibit employers and their agents from

discharging, penalizing or otherwise discriminating against an employee because he or she did not consent to receive his or her wages through direct deposit or payroll debit card.

Implications for Current Employees

To the extent an employee is already enrolled in an employer's direct deposit or payroll debit card program, the employer will have to review its records to ensure that all of the requirements set forth in the proposed regulations have been followed. To the extent they have not been followed (which is likely for most employers), prudent employers should re-enroll their employees and, as part of the re-enrollment process, ensure that employees sign the appropriate paperwork that complies with the proposed regulations.

Additional Requirements Specific to the Payment of Wages by Direct Deposit

For those employees who choose to have their wages paid by direct deposit, the employer must maintain a copy of the employee's written consent during the employee's employment and for a period six years following the last payment of wages by direct deposit. The employer also must provide a copy of that consent to the employee and make the direct deposit of wages to the employee's selected financial institution.

Additional Requirements Specific to the Payment of Wages by Payroll Debit Card

A significant focus of the revised proposed regulations concerns an employer's use of payroll debit cards for paying wages. As the use of this method has increased, the Department of Labor determined that certain restrictions and employee protections need to be implemented in order to ensure that employees are able to receive their wages in accordance with the terms of the New



York Labor Law. The revised proposed regulations applicable to the payment of wages by payroll debit card are summarized below.

1. An employer must receive an employee's written consent (as discussed above) at least seven days prior to paying the employee's wages by payroll debit card.
 2. An employer must ensure that there is "local access" to one or more automated teller machines that offer withdrawals at no cost to the employee (i.e., within a reasonable travel distance to the employee's work location or home).
 3. An employer must ensure that there is at least one method for an employee to withdraw up to the total amount of wages for each pay period or the balance remaining on the payroll debit card without the employee incurring a fee.
 4. An employer may not (directly or indirectly) charge any fees for:
 - a. Application, initiation, loading, participation or other action necessary to receive wages or to hold the payroll debit card;
 - b. Point of sale transactions;
 - c. Overdraft, shortage or low balance status;
 - d. Account inactivity;
 - e. Maintenance;
 - f. Telephone or online customer service;
 - g. Accessing balance or other account information online, by automated system or at any in-network ATM;
 - h. Providing the employee with written statements, transaction histories or the issuer's policies;
 - i. Replacing the payroll debit card at reasonable intervals;
 5. Closing an account or issuing payment of the remaining balance by check or other means;
 6. Declined transactions at an ATM that does not provide free balance inquiries; and
 7. Any fee not explicitly identified by type and by dollar amount in the contract between the employer and the issuer or in the terms and conditions of the payroll debit card provided to the employee.
5. The payroll debit card account must not be linked to any form of credit, including a loan against future pay or a cash advance on future pay.
 6. No costs associated with the payroll debit card account may be passed on from an employer to an employee, and an employer may not receive any kickback or other financial remuneration from the issuer, card sponsor or any third party for paying wages by payroll debit card.
 7. The agreement between the employer and the issuer must require that the payroll debit card funds do not expire (however, the agreement may provide that an account can be closed for inactivity if the issuer provides reasonable notice to the employee and refunds any remaining funds within seven days).
 8. At least 30 days before any change in the terms and conditions of a payroll debit card takes effect, an employer must provide written notice of that change (including changes in the itemized list of fees) in plain language, in the employee's primary language (or a language that the employee understands), and in at least 12-point font. Otherwise, any new or increased fee imposed in violation of this requirement must be reimbursed to the employee.
 9. Employers cannot pay employees by payroll debit card if they are covered by a valid



collective bargaining agreement that expressly provides the methods or methods by which wages may be paid to employees (without the approval of the union).

Comment Period, Implementation and Guidance for Employers

The proposed regulations provide for a 30-day public comment period following their publication. Any comments received by the Department of Labor during this time period will be reviewed and considered prior to the issuance of the final regulations. The final regulations will go into effect six months after they are adopted.

Employers who elect to pay their employees through payroll debit cards should expect their pay practices to be carefully scrutinized by the New York State Department of Labor. Thus, New York employers should be cautious and follow the final regulations rigidly. Employers also should be aware that the regulations, as currently proposed,

would not apply to individuals working in executive, administrative or professional capacities if they earn more than \$900 per week.

When the final regulations are adopted, prudent employers should review their payroll practices, including their new hire paperwork, notice and consent forms (for direct deposit and/or payroll debit cards), payroll policies and applicable employee handbook provisions. Employers also should consult with their payroll companies and issuers of payroll debit cards, if applicable, to ensure that the final regulations are followed faithfully and that any cardholder agreements and fee structures comply with all requirements.

For more information about this alert, please contact [Caroyn D. Richmond](mailto:Caroyn.D.Richmond@foxrothschild.com) at 212.878.7983 or crichmond@foxrothschild.com, [Glenn S. Grindlinger](mailto:Glenn.S.Grindlinger@foxrothschild.com) at 212.905.2305 or ggrindlinger@foxrothschild.com, [Jason B. Jendrewski](mailto:Jason.B.Jendrewski@foxrothschild.com) at 212.878.7952 or jjendrewski@foxrothschild.com or any member of the firm's [Labor & Employment Department](#).



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2016 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

www.foxrothschild.com