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NEW YORK STATE PROPOSES NEW REGULATIONS CONCERNING WAGE PAYMENTS BY CHECK, DIRECT DEPOSIT AND PAYROLL DEBIT CARDS

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On May 27, 2015, the New York State Department of Labor issued proposed regulations setting forth specific requirements that employers must follow if they pay their employees by check, through direct deposit, or the use of payroll debit cards. In announcing these proposed regulations, Gov. Andrew M. Cuomo asserted that they would protect employees from “predatory practices.” Gov. Cuomo explained that “[t]hese regulations crack down on one of the more underhanded forms of wage theft and will better protect hundreds of thousands of employees who work and live in New York.”

New York law and these proposed regulations permit employers to pay employees their wages using the following methods: cash; check; direct deposit; or payroll debit card. However, if an employer is to pay their employees other than by cash, there are several requirements with which they must comply. With respect to payment by check, employers must ensure:

- The check is a negotiable instrument;
- There is at least one means of no-cost, local access to the full amount of wages through check cashing or deposit of check at a financial institution or other establishment reasonably

accessible to the employee’s place of employment; and

- The employer does not impose any fees in connection with the use of checks for payment of wages, including a fee for replacement or a lost or stolen check.

Most employers who pay their employees by check are probably already in compliance with these proposed regulations. However, the proposed regulations do reinforce long-standing New York law that employers cannot charge employees a fee or other payment when employees request reissuance of their paychecks because their prior checks were lost or stolen.

In order to pay employees by direct deposit, the employer must:

- Obtain written consent from the employee;
- Maintain a copy of the written consent for the duration of the employee’s employment and for a period of six years following the cessation of the employment relationship;
- Provide a copy of the written consent to the employee; and

- Deposit the pay to the financial institution selected by the employee.

Implicit in these regulations is that direct deposit is the employee's choice. Employers cannot require employees to receive their pay via direct deposit.

Throughout the country, payroll debit cards are becoming an increasingly popular way for employers to pay their employees. The proposed regulations set forth very specific requirements with which employers must comply. If an employer wants to pay employees through payroll debit cards, the employer must:

- Obtain the employee's advanced, written consent (and the union's consent, if applicable), which means that employers cannot require their employees to accept wages through payroll debit cards, and in fact, the proposed regulations specifically forbid an employer from requiring employees to use payroll debit cards as a condition of employment;
- At least seven days before even seeking such consent, the employer must provide the employee in writing, in at least 12-point font, and in the employee's primary language or in a language that the employee understands:
 - o A plain language description of all the employee's options for receiving wages;
 - o A statement that the employer may not require the employee to accept wages through a payroll debit card or by direct deposit;
 - o 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
 - o A list of locations "within a reasonable proximity to their place of residence and place of work" where employees can access and

withdraw wages at no charge to the employee.

- At least 30 days before any change in the terms and conditions of a payroll debit card takes effect, the employer must provide written notice in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font, of any change to the terms or conditions of the payroll debit card account, including any changes in the itemized list of fees. If the issuer charges the employee any new or increased fee within 30 days of the date the employer has provided the employee with written notice of the change, the employer must reimburse the employee for the amount of that fee.

The employer is also required to retain this documentation throughout the duration of the employee's employment and for six years after the employment relationship ends.

Further, the proposed regulations also state that in order to pay employees via payroll debit card:

- There must be at least one network of automated teller machines (ATM) that offers withdrawals at no cost to the employee;
- There must be at least one method to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without the employee incurring a fee;
- Upon the employee's written or oral request, the following statements must be provided either electronically or on paper:
 - o A periodic statement not less frequently than monthly; or if there is a balance but no activity with respect to the payroll debit card, not less frequently than every three months;

- o A transaction history covering at least 12 months preceding the request, which shall include all transactions, including deposits, withdrawals, fees charged or other transactions by any entity from or to the employee's payroll debit card account; and
- o Electronic balance notifications on a per day or per transaction basis.
- The employee must be able to obtain an annual electronic or paper notice of the right to obtain a transaction history, annual statement or periodic statement on request.
- An employer or its agent cannot deliver payment of wages by payroll debit card that is linked to any form of credit, including a loan against future pay or a cash advance on future pay.
- The employer cannot receive any kickback or other financial remuneration from the issuer, card sponsor or any third party for delivering wages by payroll debit card.
- An agreement between the employer and issuer must exist that explicitly states that:
 - o Any wage payments issued on a payroll debit card cannot expire. However, the agreement may provide that the account may be closed for inactivity provided that the issuer gives reasonable notice to the employee and that the remaining funds are refunded within seven days; and
 - o If an employee reports the payroll debit card as lost or stolen or reports fraudulent activity on the payroll debit card, the issuer must stop all card activity, conduct a reasonable investigation within 10 days, and re-credit or reimburse any fraudulent or unauthorized transactions within one business day of the conclusion of the investigation.

- Employees cannot incur any costs in order to access their wages and the employer or its agent (presumably the company that issues the payroll debit card) cannot assess any fee for:
 - o Application, initiation, loading, participation or other action necessary to receive wages or to hold the payroll debit card;
 - o Point of sale transactions, declined transactions and other transactions;
 - o Overdraft, shortage or low balance status;
 - o Account inactivity;
 - o Maintenance;
 - o Telephone or online customer service;
 - o Accessing balance or other account information online, by Interactive Voice Response through any other automated system offered in conjunction with the payroll debit card or at any ATM in network made available to the employee;
 - o Providing the employee with written statements, transaction histories or the issuer's policies;
 - o Replacing the payroll debit card at reasonable intervals;
 - o Closing an account or issuing payment of the remaining balance by check or other means; or
 - o 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.

The proposed regulations provide for a 45-day comment period. Any comments received by the Department of Labor during that period will be reviewed and taken into consideration before the final regulations are issued. However, based on recent

history, employers should assume that when the final regulations are issued there will be little to no change from the proposed regulations.

Employers who elect to pay their employees through payroll debit cards should expect their practices to be carefully scrutinized by the Department of Labor and other governmental officials. Thus, employers should be cautious and follow these regulations rigidly. Employers will have to work with their payroll companies and the issuers of payroll debit cards, if applicable, to ensure that these regulations are faithfully followed. If there are mistakes, it will be the employers who will have the exposure, not the financial institutions and debit card

issuers. Prudent employers should also reexamine all of their new hire paperwork and confirm that their direct deposit forms and payroll debit card enrollment forms comply with New York law.

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