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# New York Pay Card Regulations Upheld by Appellate Court

By Glenn S. Grindlinger

A recent New York appellate ruling validates the New York Department of Labor's (DOL) regulations limiting the use of pay cards to pay employees their wages. Unless this decision is appealed to the New York Court of Appeals, the state's highest court, the appellate ruling upholds the DOL's rules and settles key ambiguities surrounding how employers may pay employees via pay cards.

Many employers nationwide elect to pay their employees via pay cards. Following concerns that employers and financial institutions may take advantage of employees who are paid this way, the DOL issued [regulations in 2015](#) limiting the use of pay cards within the state. Various administrative bodies enjoined the DOL's rules on pay cards and thus introduced certain inconsistencies in the manner that employees could pay New York employees, which the aforementioned appellate decision seeks to clarify.

Employers who choose to compensate employees with pay cards should prepare to closely comply with the DOL's pay card regulations, and expect heightened scrutiny from the DOL.

## Background on NY Pay Card Regulations

The DOL issued proposed regulations on May 27, 2015, setting forth specific requirements that employers must follow if they pay their employee by check, through direct deposit or the use of payroll debit cards (also known as pay cards). In September 2016, these rules were finalized and

became effective. However, almost immediately, Global Cash Card, Inc. (GCC), a pay card provider, appealed the rules to the New York State Industrial Appeals Board arguing that the rules exceeded the DOL's statutory authority. During this initial appeal, the rules were suspended pending a decision by the Industrial Appeals Board.

The Industrial Appeals Board agreed with GCC finding that the DOL exceeded its statutory authority when it implemented the regulations as they pertained to pay cards. As a result, the pay card rules were invalidated. The DOL then sought review of the decision of the Industrial Appeals Board in Supreme Court, Albany County, which overturned the Industrial Appeals Board's decision finding that the rules were valid.

GCC then appealed to the New York Supreme Court, Appellate Division, Third Department, which agreed with the trial court. The Appellate Court found that the pay card rules were within the DOL's authority to issue and as such are considered valid. Accordingly, unless the Court of Appeals agrees to hear the matter, the Third Department's ruling should settle the ambiguity over how employers in New York may pay their employees via pay card.

## Pay Card Rules

If an employer wants to pay its employees through pay 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 (7) 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:
  1. A plain language description of all the employee’s options for receiving wages;
  2. A statement that the employer may not require the employee to accept wages through a 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 a reasonable proximity to their place of residence and place of work” where employees can access and withdraw wages at no charge to the employees.
- At least 30 days before any change in the terms and conditions of a pay 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 pay card account including any changes in the itemized list of fees. If the pay card issuer notifies the employee of payment changes for a set date and charges the

employee any new or increased fee before 30 days of that date, 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 DOL regulations also state that in order to pay employees via pay card, there must be at minimum:

- One network of automated teller machines that offers withdrawals at no cost to the employee.
- One method to withdraw up to the total amount of wages for each pay period or balance remaining on the pay card without the employee incurring a fee.
- The following statements must be provided either electronically or on paper upon the employee’s written or oral request:
  - o A periodic statement not less frequently than monthly; or if there is a balance but no activity with respect to the pay 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 pay 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 pay 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 pay card.
- An agreement between the employer and issuer must exist explicitly stating that:
  - o Any wage payments issued on a pay 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 pay card as lost or stolen or reports fraudulent activity on the pay 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 their agent (presumably the company that issues the pay card) cannot assess any fee for:
  - o Application, initiation, loading, participation or other action necessary to receive wages or to hold the pay 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 pay 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.

Employers who elect to pay their employees through pay cards should expect that their practices will be carefully scrutinized by the DOL. Thus, employers should be cautious and follow these regulations rigidly. Employers will have to work with their payroll companies and the issuers of pay cards, if applicable, to ensure that these regulations are faithfully followed; if there are mistakes, it will be the employers who will bear the risks, not the financial institutions and pay card issuers. Prudent employers should also reexamine all of their new hire paperwork and confirm that pay card enrollment forms comply with New York law.

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