



Impending New York Regulation Discouraging Payment By Direct Deposit And Debit Card Struck Down

Insights

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Yesterday, the New York Industrial Board of Appeals struck down a regulation adopted by the New York Department of Labor (NYDOL) which sought to regulate the manner in which employers pay wages. The impending regulation, which was set to take effect March 7, 2017, would have discouraged New York employers from paying their workers by direct deposit or debit card. Although there is still a chance the regulation might be revived, New York employers should take note of this February 16, 2017 ruling and adjust pay practices as necessary.

Board Rules NYDOL Went Too Far

Ruling on a petition filed by Global Cash Card, Inc., a payroll debit card vendor, the New York Industrial Board of Appeals (Board) found the impending regulation invalid and therefore revoked it. The Board ruled that the regulation exceeded the NYDOL's authority and went beyond the scope of its rulemaking authority under the New York State Labor Law.

The Board found two provisions of the regulation to be particularly flawed: (1) the requirement that employers provide access to one or more automatic teller machines that offer withdrawals at no cost to the employee; and (2) requirements that prohibit a payroll debit card issuer from charging an employee certain fees related to the use of a payroll debit card. The Board ruled that these provisions regulated banking services, an area beyond the scope of the NYDOL's authority to regulate labor law.

What Does The Regulation Say?

The regulation at issue, adopted by the NYDOL on September 7, 2016 and originally slated to take effect on March 7, 2017, would have clarified permissible methods by which wages may be paid and how wages may be appropriately paid via direct deposit and payroll debit card. The regulation would have permitted New York employers to pay wages by cash, check, direct deposit, or payroll debit card, and would have set forth detailed notice and consent requirements prior to issuing payment via direct deposit or payroll debit card. The regulation was designed to apply to all employees who work in New York State, except those employed in a bona fide executive, administrative, or professional capacity and whose earnings exceed \$900 per week, and certain farm workers.

Notice Requirement

If the regulation had taken effect, any employer who uses payment methods other than cash or check would have been required to provide a highly specific written notice to all employees, which would have had to:

- advise the employee in plain language of all options for receiving wages (i.e., check, direct deposit, and/or debit card);
- inform the employee that the employer cannot mandate that the employee accept wages by direct deposit or debit card;
- notify the employee that he or she may not be charged any fees to access his or her wages; and
- if the employee is offering the option of payment via a payroll debit card, provide a list of locations, within reasonable proximity to the workplace or residence of the employee, where the employee can access and withdraw the wages free of charge.

Consent Requirement

The regulation would have required an employer to obtain the employee's written consent prior to issuing payment by direct deposit or payroll debit card. The consent would not have been able to be obtained through intimidation, coercion, or threats of an adverse employment action if the employee refused to consent to such payment methods. Nor could an employer make acceptance of wages by direct deposit or debit card a condition of employment or continued employment.

Further, under the regulation, an employee would have been able to withdraw consent at any time, in which case the employer would have been forced to comply with the employee's request for payment by check no later than two pay periods after the request. Both the written notice and consent would have had to have been provided in both English and in the primary language spoken by the employee.

Requirements for Payment of Wages by Direct Deposit

In addition to satisfying the notice and consent requirements, an employer seeking to pay wages by direct deposit would have had to ensure that the deposit is made to a financial institution selected by the employee had the regulation gone into effect. The employer would have been required to provide a copy of the written consent to the employee, and retain a copy of the consent throughout the period of employment and for six years following the last payment of wages by direct deposit.

Requirements for Payment of Wages by Payroll Debit Card

As with payment of wages by direct deposit, an employer who would have sought to pay wages to an employee by payroll debit card would have been required to provide notice to the employee and obtain written consent. However, the employer would have been required to wait seven business

days after receiving the consent before issuing such payment by debit card. Among other things, the regulations also would have required such employers to:

- provide the employee local access to at least one automated teller machine that offers withdrawals at no cost to the employee;
- provide at least one method 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;
- ensure that the funds on the payroll debit card will never expire;
- never charge or pass along any fees to the employee for application, initiation, loading, or participation fees; a fee for point of sale transactions; an overdraft, shortage or low balance status fee; a fee for account inactivity; a maintenance fee; any charges for using telephonic or online customer service; charges for accessing balance or other account information through any means; fees for providing the employee with statements, transaction histories, or the card issuer's policies; charges for ordering replacement cards; fees for closing the account; costs associated with requests to issue payment of the balance on the debit card by check; declined transaction fees; or any other fee not explicitly identified by type and dollar amount in the contract between the employer and issuer or in the terms and conditions of the payroll debit card provided to the employee;
- never use the debit card to issue any loan or advance on wages;
- never accept kickbacks or other financial remuneration from the debit card issuer, card sponsor, or any third party for delivering wages by payroll debit card; and
- provide 30-days' notice prior to any change or modification in the terms and conditions regarding use of the payroll debit card, in plain language and at least 12-point font.

What's Next?

The NYDOL has sixty days to appeal the decision to the New York State Supreme Court, which is the trial court level of the state court system. Until any further decision is issued, the regulation is deemed revoked and without force. The NYDOL may choose to appeal the decision, or seek to implement revised regulations to comply with the Board's decision.

New York Labor Law § 192 still requires an employer to obtain consent prior to paying an employee by direct deposit or payroll debit card. Likewise, under New York Labor Law § 193, it is illegal to charge employees, directly or indirectly, to receive their wages. Additionally, a January 15, 2010 opinion letter from the NYDOL interpreted the state law to permit payment of wages via debit cards only if the employer provides the employee with an effective means to make unlimited withdrawals on that card without incurring fees, either through a bank teller or an ATM. New York employers must still comply with these pre-regulation requirements, and should be prepared to adjust their

business practices should the court breathe new life into the regulation or if the NYDOL issues a revised rule.

For more information about this decision and proposed regulation, contact any attorney in our [New York City office](#) at 212.899.9960, or your regular Fisher Phillips attorney.

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