

# **New Regulation Restricts New York Employers Seeking to Pay Wages by Direct Deposit, Payroll Debit Cards**

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The New York Department of Labor has adopted a regulation that reiterates an employer generally must obtain written consent to pay wages by direct deposit of wages and clarifies the legality of paying wages with payroll debit cards. Once effective on March 7, 2017, the Regulation, published on September 7, 2016, will impose greater obligations on employers who wish to offer the option of wage payment through payroll debit cards or direct deposit. Therefore, employers will need to take internal measures to comply with the Regulation.

## **Required Written Notice, Consent for Wage Payments by Direct Deposit, Payroll Debit Card**

Employers that wish to pay wages with direct deposit or payroll debit card will be required to provide detailed written notice to employees explaining:

1. the employee's options for methods of receiving wages;
2. acceptance of wages by payroll debit card and/or direct deposit is not required, with limited exceptions (generally, white collar exempt employees who make more than \$900 per week); and
3. no fees will be charged for services necessary to access wages in full if receipt of wages by payroll debit card is being provided as an option.

Employers also will be required to provide a list of locations where employees can access and withdraw wages without charge within "reasonable proximity" to an employee's residence or workplace.

Subject to limited exceptions, an employer must obtain an employee's written consent to pay wages

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by direct deposit or debit card. Further, an employer cannot make payment of wages by direct deposit or debit card a condition of hire or of continued employment.

Notices and consents must be provided or obtained in English, and the primary language of any non-English-speaking employee, assuming a template notice and consent in such language is available from the DOL. Electronic notice is permissible if all regulatory requirements are met.

## **Additional Requirements Specific to Payroll Debit Cards**

The heaviest burden imposed by the Regulation falls on employers seeking to make wage payments by payroll debit card.

### ***1. Waiting Period after Obtaining Consent***

The employee must consent to wage payment by debit card at least seven business days prior to the employer making payment through use of the payroll debit card — potentially necessitating initial payment of wages by another means, such as a traditional payroll check.

### ***2. Employees May Not Incur Fees***

An employee may not be charged a fee, directly or indirectly, for a laundry list of items, including:

- Application, initiation, loading, participation, or other action necessary to receive wages or to hold the payroll debit card;
- Point-of-sale transactions;
- Overdraft, shortage, or low balance status;
- Account inactivity;
- Maintenance;
- Telephone or online customer service;
- 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;
- Providing the employee with written statements, transaction histories, or the issuer's policies;
- Replacing the payroll debit card at reasonable intervals;
- Closing an account or issuing payment of the remaining balance by check or other means;
- Declined transactions at an ATM that does not provide free balance inquiries; or
- 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.

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### **3. Wages Separate from Credit, Future Pay**

Wages paid with debit card must not be linked to any form of credit, including a loan against future pay or a cash advance on future pay.

### **4. Employer Cannot Pass Costs, Obtain Kickbacks**

Should an employer incur costs associated with payroll debit card accounts, it may not pass any of them to the employee or receive kickbacks or any financial remuneration from the issuer, card sponsor, or any third party for delivering wages by payroll debit card.

### **5. Wages May Not Expire**

Funds placed on a debit card cannot expire. However, an agreement may allow the employee's account to be closed for inactivity, provided the issuer gives "reasonable notice" to the employee and the remaining funds are refunded within seven days.

### **6. Additional Notice Requirements, Reimbursement for Fees Charged**

At least 30 days before any change in the terms and conditions of a debit card take effect, an employer must provide written notice (in "plain language" and 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 before 30 days after the date the employer has provided the employee with written notice of the change, the employer must reimburse the employee the amount of that fee.

### **7. Existence of a CBA**

If an employee is covered by a valid collective bargaining agreement (CBA) that expressly provides the method(s) by which wages may be paid to employees, an employer also must have the approval of the union before paying by debit card.

## **Suggested Employer Actions**

Employers should consider the following affirmative steps:

- Review current payroll practices to ensure all employees being paid with direct deposit or payroll debit cards have been provided with written notice that complies with the Regulation and have voluntarily signed compliant consent forms. *(Previously signed direct deposit and payroll debit cards consent forms will remain valid, assuming an employer provides written notice that complies with the Regulation before March 7, 2017, and employees are expressly notified of the right to withdraw consent.);*
- Coordinate arrangements with existing or potential payroll debit card providers to ensure offerings comply with all requirements, including, but not limited to, those related to fees, and provide employees with individual lists identifying locations for cash access in proximity to their home or workplace; and

- Review existing CBAs to determine whether union approval is needed to pay wages through payroll debit cards.

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National Law Review, Volume VI, Number 264

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